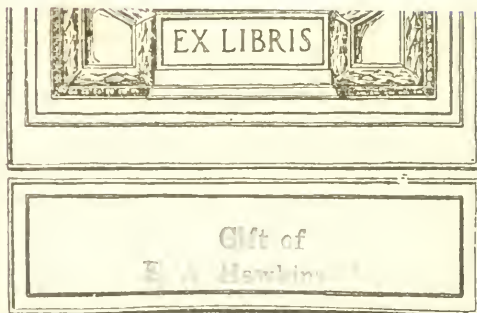


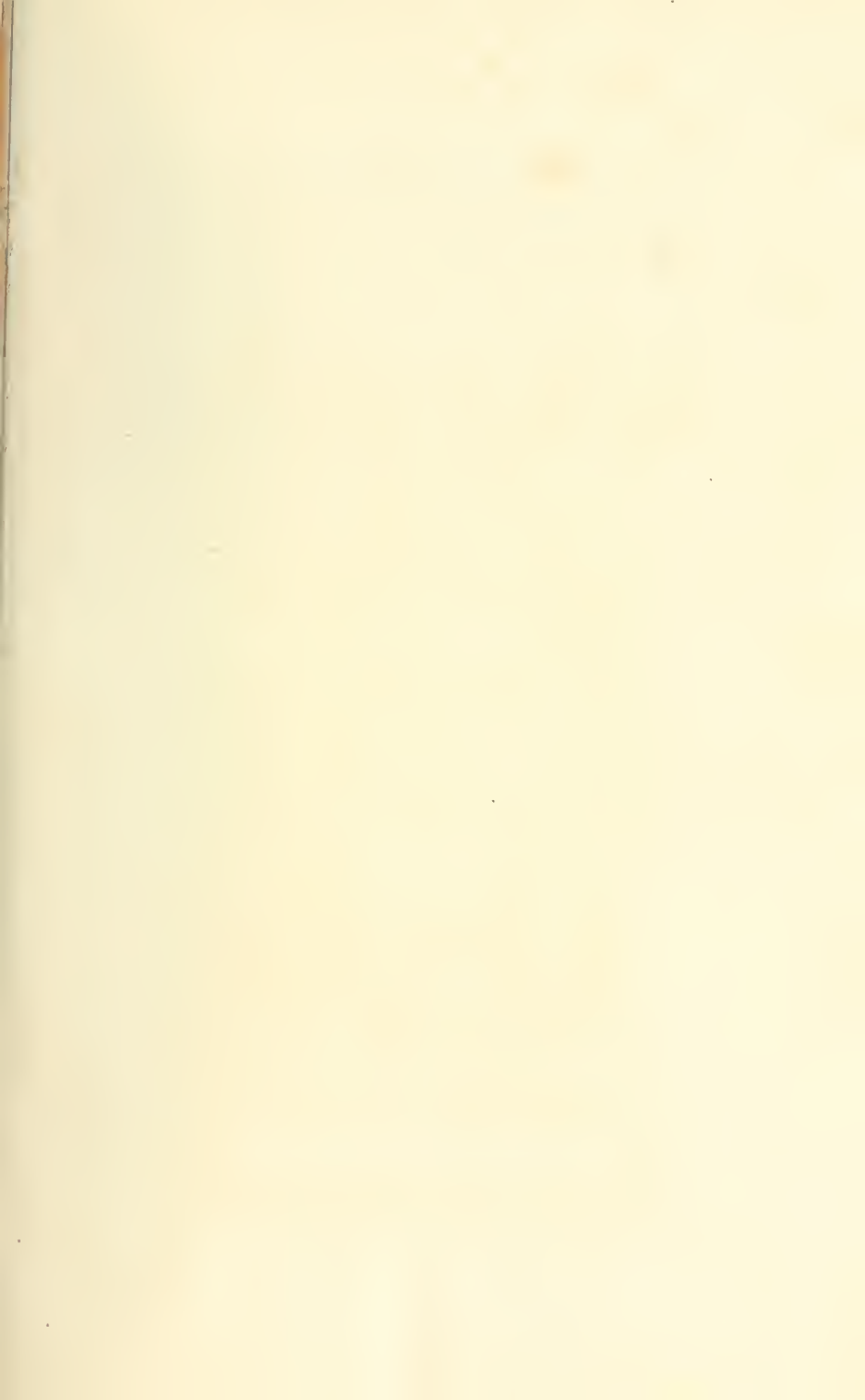




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BANKING CASES,
ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING BANKS DECIDED BY THE
COURTS OF LAST RESORT

IN THE

UNITED STATES.

EDITED BY
THOMAS JOHNSON MICHIE.

VOLUME II.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VIRGINIA.

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AMERICAN AND ENGLISH RAILROAD CASES, N. S.
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MUNICIPAL CORPORATION CASES.
BANKING CASES.

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BANKING CASES.

VOLUME II.

CITIZENS' SAV. BANK

v.

WALDEN *et al.*

SAME

v.

LYDDANE *et al.*

(*Court of Appeals of Kentucky, Oct. 13, 1899.*)

Discounting Notes—Fraud—Knowledge of Cashier Notice to Bank.*
—M, who was a director and stockholder in a fence company, and also the cashier of the plaintiff bank, as the agent of the company, procured notes by fraud, which were discounted by the bank through the cashier. *Held*, that its cashier's knowledge of the fraud was notice to the bank.

APPEAL by plaintiff from Daviess county circuit court.
Affirmed.

Robt. S. Todd, Reuben A. Miller, and W. S. Pryor, for appellant.

Walker & Slack, for appellees.

WHITE, J. These two actions were never consolidated, but, the two transactions, the two actions, and the defenses being very similar, the court below heard them together, and rendered one opinion. Like action has been followed in this court.

The facts, as they appear admitted by the pleadings, and the contentions of each party, are: In 1890 W. H. Moore was the cashier of appellant bank, and at the same time a director and stockholder in a corporation known as the Kentucky & Indiana Hedge-Fence Company; and, as director

*See *note*, 1 Banking Cases 28.

Citizens' Sav. Bank v. Walden

of the last-named corporation, Moore was authorized to sell, and did sell, shares of stock of the fence company. He sold stock to appellee Lyddane, and also to appellee Walden, taking notes for each sale, due 18 months after date; the notes payable in appellant bank. Before maturity of these notes they were each discounted by the directors of the fence company to the appellant bank, the indorsement being by the individual directors in each case. The note of appellee Lyddane was twice renewed; interest being added in the renewal, and some interest being paid. By the contention of appellant, the note of Walden was paid or renewed by a bill of exchange drawn by J. P. Moreland on Walden, and for the benefit of J. A. Fuqua, and, by the proper indorsement, discounted at and assigned to appellant bank. These actions are brought, as against Lyddane, on the last renewal, and, as to Walden, on the bill of exchange. Appellee Lyddane pleaded as a defense that the original note of his was obtained by false and fraudulent representations of W. H. Moore at the time as to the condition of the affairs of the fence company; that appellee was ignorant of the falsity, while Moore knew the statements to be false; that the two renewals were procured by Moore, who at the time was the cashier of appellant and a director in the fence company, by further false and fraudulent representations of the condition of the fence company, and by reiterating the former false and fraudulent representations, all of which Moore knew to be false, and also knew appellee to be ignorant as to the truth or falsity of the statements, upon which statements the appellee relied. It is further pleaded that Moore being the cashier of appellant, and having himself full knowledge of the fraud used in procuring the original and renewal notes, the appellant is not an innocent purchaser, but is chargeable with notice of all infirmities of the paper. This same defense is pleaded by Walden as to the original note given for stock. Walden also pleads further that the bill sued on, drawn by Moreland, accepted by Walden, and indorsed by Fuqua,

Citizens' Sav. Bank v. Walden

was also obtained by the fraud of Moore, cashier of appellant. He says that, at the time this bill was drawn and discounted, he (Walden) was indebted to appellant in several sums, due at different times, and on which Moreland and Fuqua were his sureties, and that, when this bill was drawn and indorsed, they (Walden, Moreland and Fuqua) were told it was a renewal of one of these several debts on which Moreland and Fuqua were already bound, and, relying on this statement by Moore, cashier, the bill was drawn and indorsed; that the original note for the stock was not delivered up or canceled or paid off by this bill; and that appellant still holds the original note for stock, but that in any event the bill is without consideration, if not for renewal of the fence-stock note, but, if for fence-stock note, he relies on the fraud of Moore in procuring that note. Appellant denied the fraud or false statements of Moore in the sale of the stock in the fence company to either Lyddane or Walden, and denied the statements alleged to have been made by Moore in the renewals by Lyddane, or in the renewal by bill by Walden; denied that it was bound by any statements made by Moore, as director or agent, in the sale of the stock in the fence company; averred it was a purchaser for value, before maturity, and without notice of any infirmity or defense. On the issues of fact, proof was taken, and upon trial the court dismissed the actions, canceled the notes, and restored the shares of stock. It is conceded that the stock in the fence company is of very little, if any, value. From that judgment in each case appellant appeals.

We are of opinion that the conclusion reached by the learned trial judge in his opinion, that the appellant is not entitled to recover, is correct. We are of opinion from the evidence that the original notes and the renewals in the one case, and bill in the other, were obtained by the false representations of Moore, who was the authorized agent of the fence company to sell stock, and at the same time cashier of appellant bank. In reaching this conclusion, we do not

Citizens' Sav. Bank v. Walden

take into consideration the testimony of the various witnesses who testified as to having purchased stock from Moore under like representations. This testimony was objected to, and we do not decide whether or not it was admissible evidence. We deem it unnecessary, in our view of the case. We are also of opinion that the purchase or discount by appellant through its cashier, Moore, who knew of the false representations and the fraud used in obtaining the notes, will operate as notice to the bank of the infirmities in the paper, and appellees still are entitled, as against appellant, to any defense they may have had as against the original payor. It cannot be denied that, if the notes were obtained by fraud, the chief executive officer of appellant had full knowledge of the fact. Appellant is a corporation, and can only act through some agent, and, if notice can be given to the corporation, it must be given to some agent. Common usage generally has made the cashier the chief officer and agent of the bank, and notice to the cashier, Moore, was notice that will bind the bank. 2 Am. & Eng. Enc. Law, 118, 119, and cases there cited. We are also of opinion from the evidence that the bill of Walden was procured by false and fraudulent representations that it was to renew and extend some liability other than the note for the fence-company stock. There is a motion by appellees to dismiss the appeal in the Walden case, but a decision of this question becomes unnecessary. Finding no error, the judgment of the circuit court is affirmed.

First Nat. Bank of Corunna v. Michigan City Bank

FIRST NAT. BANK OF CORUNNA, MICH.,

v.

MICHIGAN CITY BANK.

(*Supreme Court of North Dakota, Oct. 20, 1899.*)

Authority of Cashier to Borrow Money.*—The cashier of a state bank organized under chapter 23 of the Laws of 1890 has no authority to borrow money, unless it is specially given by the board of directors.

Bank's Liability for Money Borrowed by Officers.—One who seeks to charge a banking corporation organized under said act upon a loan made by one of its officers must show that such officer had express authority from the directors to make the loan, or that it was ratified by them.

Same—Cashier Rediscounting Forged Notes.—The plaintiff seeks to recover the amount due upon four notes, which are admitted to be forgeries as to the makers, which notes it claims to have rediscounted for the defendant in reliance upon the latter's promise to pay plaintiff the amounts they call for, when they became due. Plaintiff dealt with defendant's cashier only. *Held*, under the facts stated in the opinion, that the transaction was a loan. *Held*, further, that inasmuch as it does not appear that the cashier was authorized to make such loan by the directors of the defendant bank, or that his acts were ratified by them, the defendant is not liable therefor.

(Syllabus by the Court.)

APPEAL by plaintiff from Grand Forks county district court.
Affirmed.

Burke Corbet, for appellant.

Cochrane & Corliss, for respondent.

YOUNG, J. The First National Bank of Corunna, Mich., sues the Michigan City Bank to recover the amount due

*See the recent case of *Auten v. United States Nat. Bank of New York* (U. S.), 1 Banking Cases 416, and *note*, p. 441.

First Nat. Bank of Corunna v. Michigan City Bank

upon certain promissory notes which it alleges it purchased from said bank in due course of business, and for value. It is conceded that the notes were forgeries as to the makers. Plaintiff states its cause of action in three counts,—the first upon a purchase; second, upon defendant's indorsement of the notes; and, third, upon a separate written guaranty of payment. The answer of defendant denies that it sold, indorsed, or guarantied the payment of said notes. A jury was waived, and the case was tried to the court, resulting in findings and a judgment favorable to the defendant. Plaintiff appeals, and the case is here for trial anew.

It is undisputed that all of the transactions which took place between the plaintiff and defendant upon which the alleged liability of the defendant is based were had with one H. B. Cram, who purported to be defendant's cashier, and to be acting as such in such transactions as occurred. It is not claimed by plaintiff that it did any portion of the business with any other person or officer of the defendant bank, and it does not appear that there ever was any dealing between the plaintiff and defendant other than that here in question; so that the entire alleged liability of the defendant is based upon the acts of Cram. The defendant is organized under chapter 23 of the Laws of 1890, providing for the organization and government of state banks. Its certificate of authority, authorizing it to commence the business of banking, was issued by the secretary of state on January 23, 1893. Prior to that time the stockholders had named its directors in the articles of association. There is no record of a formal meeting of the directors for any purpose until June 6, 1893, when a president and vice president were elected, and B. H. Cram was also elected as cashier. It is admitted by the defendant, however, that it had been doing a banking business since April 6th, and that during such time Cram acted as cashier, with the knowledge and consent of the directors. Plaintiff contends that he acted as cashier with the same consent and knowledge on the part of the directors prior to April 6th, and at all

First Nat. Bank of Corunna *v.* Michigan City Bank

times after the bank was organized to do business. Whether his assumption of authority to act as cashier during this earlier period was with the consent and knowledge of the directors is a mooted question of fact, to which counsel for both parties have devoted much attention. The view which we take of the limitations upon a cashier's authority to bind his bank to the obligations which are here sought to be enforced is necessarily decisive of the case, and renders a determination of this disputed question unnecessary. It may be assumed that Cram was at all times the cashier of defendant bank, and that he was clothed with the usual authority of cashiers. Nevertheless, in our opinion, his acts, which are here relied upon to create a liability against the defendant, are so far beyond the ordinary duties and implied authority of a cashier that they do not bind the corporation, unless it is shown that he was specially authorized by the directors to do what he did, or unless his acts have been ratified by them. The transaction was this: Early in the winter of 1893, Cram called at plaintiff's bank to interest it in discounting some paper for the defendant bank. It seems that plaintiff's cashier then orally agreed to rediscount a reasonable amount, and that the plaintiff then and at all times relied wholly upon Cram's promise that the defendant would itself pay all of the notes it should rediscount, when they became due. After this conversation, on February 22, 1893, Cram wrote plaintiff as follows: "If we make a deal, we guaranty all paper, and will pay all paper as fast as it becomes due. You send the notes to this bank for collection, and, as fast as they become due, we will send you New York draft for same." Plaintiff's reply seems to have been favorable, for on February 27th Cram mailed to it 14 notes, aggregating in amount \$2,527, and in his letter accompanying them said: "I note what you say in regard to discounts. These notes are all due next fall, and, as I told you before, we will send N. Y. draft for these as fast as they become due." Some time after receiving these notes, plaintiff remitted for them by sending two drafts drawn upon its New York correspond-

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ent, payable to H. B. Cram, cashier. It sent \$1,050 March 16th, and \$1,477 on April 7th. Both drafts were received by Cram, and were deposited by him in the National German-American Bank of St. Paul, to the credit of an account which the evidence shows he carried there in the name of the Michigan City Bank, and were paid by the New York bank, and charged to plaintiff's account, in due course of business. When the notes matured, plaintiff sent them to the defendant "for payment." Upon their receipt, Cram wrote to plaintiff, using this language: "I will remit to you on the 13th of this month on the past-due discounts;" and on November 13th he sent plaintiff a New York draft for \$1,889.58, covering the amount due on 9 of the notes. On January 25, 1894, Cram sent plaintiff 14 other notes, requesting it to discount them, and, after taking out the balance due on the notes formerly discounted, to remit the balance. Plaintiff selected 4 notes out of the 14, which amounted to \$773.64. Out of this amount it reserved the balance due it, which was \$743.60, and for the excess sent its draft on a Chicago bank, payable to H. B. Cram, cashier, in the letter returning the notes not discounted. This small draft was deposited by Cram in the Grand Forks National Bank to the credit of the defendant. These four notes so selected are the ones described in the complaint. It is conceded that they have not been paid, and that they, as well as all of the notes sent by Cram, were forgeries as to the makers. None of these notes appear to have been listed upon the books of the bank. It appears that Cram's dishonest methods were discovered some time after he drew the draft upon defendant's funds for the \$1,889.58 remitted to plaintiff, and his resignation as cashier was obtained by the directors; but it was some time later before any of the officers of the bank knew of the existence of the four notes in suit, or that plaintiff held other notes which it claimed to have discounted for defendant through Cram, as cashier.

We have stated the facts thus fully to show that this transaction was intended and understood by plaintiff to be merely

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a rediscount by it of certain paper which it supposed belonged to the defendant, and to be due to the latter from its customers. This, we take it, is not an unusual transaction between banks, and is one of the methods resorted to by them for lending and borrowing money. A bank whose necessities require it to raise funds for use usually secures them either by giving its own direct obligation or by rediscounting its customers' paper, with an accompanying promise to take it up when it is due, as was done in this case. Either method creates an obligation of the borrowing bank, which is represented by the note given or the notes discounted. Both are methods of borrowing money. It is apparent that the plaintiff, to enforce its demands against the defendant, must show that the obligations which Cram undertook to make on behalf of the banking corporation which he represented in the capacity of cashier were either authorized by its directors, or that his acts, if unauthorized, were ratified by them, or it must appear that he had the authority to borrow money and enter into the obligations in question by virtue of his authority as cashier, and independent of any authorization or ratification. It is not

Authority of
Cashier to
Borrow Money.

claimed that any special authority was given to him, and there is an entire failure to show that his acts have been ratified; so that the liability of defendant depends upon the single question of Cram's power to bind defendant for a loan ostensibly negotiated for it arising out of his general authority as cashier. Both reason and judicial interpretation lead us to deny that he had such authority. Chapter 23 of the Laws of 1890, under which the defendant is organized, is copied from the national banking act. That portion of the act relating to the powers of banks is found in subdivision 7 of section 4 of said chapter, and is the same as Rev. St. U. S.

Bank's Liability
for Money Bor-
rowed by Offi-
cers.

§ 5136, par. 7, and reads as follows: "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discount-

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ing and negotiating promissory notes, bills of exchange, drafts and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security." To this the parent statute has added the power of obtaining, issuing, and circulating notes. The question of the borrowing power of a banking corporation under this section, and the lawful manner of its exercise, was squarely before the supreme court of the United States in the case of *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, decided in 1893; and it was then held that the borrowing of money was so much out of the course of legitimate banking that those making a loan to a bank must see to it that the officer assuming to act had special authority to act. After quoting Rev. St. U. S. § 5136, par. 7, the court said: "The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by the court in the case of *First Nat. Bank v. National Exch. Bank*, 92 U. S. 127, 'authority is given in the act to transact such a banking business as is specified, and all necessary powers to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see that the officer or agent acting for the bank had special authority to borrow money." It is true that the official whose action was in question in this case was the vice president, but there was evidence which went to show that he was the principal executive officer of the bank; and the court, in its opinion, assumed that he was, but said that

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"it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with a bank are presumed to know the extent of the general powers of the officers." Later the circuit court of appeals, Sixth circuit, in *Bank v. Armstrong*, 13 C. C. A. 47, 65 Fed. 573, in following this case, refers to it as holding that "the borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money, and that where no such special authority appears, and no ratification of the unauthorized act is shown, the bank is not liable." Further on in its opinion, that court, after citing copiously from state courts, said: "The effect of the foregoing cases is that it is within the usual course of banking business for a bank to borrow money, and that the generally recognized authority of the cashier or managing officer of the bank extends to making such loans, and that therefore any one dealing with such officer has the right to rely on the existence of such authority unless the contrary appears;" and then adds: "The effect of the decision in *Bank v. Armstrong* is to make the above rule as to the authority of a cashier to borrow money for the bank inapplicable to national banks." In view of the close relationship of our statute under which defendant exists with the national banking act from which it is admitted the act of 1890 is copied, these decisions are, we think, decisive as to the authority of a cashier of a state bank organized under this law to borrow money; and we have no hesitation in adopting their interpretation, which appeals to us as both sound and salutary.

The district court gave plaintiff judgment for \$30.04, with 7 per cent. interest from January 29, 1894, for the small draft which was sent by it on that date, and deposited to defendant's credit in the Grand Forks National Bank. This we do not disturb. The judgment of the district court is affirmed. All concur.

Same—Cashier
Rediscounting
Forged Notes.

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STATE

v.

MASON.

(Supreme Court of Kansas, Nov. 11, 1899.)

Banks—Beginning of Existence—Failure to Issue Certificate of Authority—Criminal Liability of Officers.—Where several persons associate themselves together with a view of organizing a bank, and duly file a charter as a state banking corporation, the existence of the corporation dates from the filing of the charter; and if such bank is thereafter conducted under the supervision and control of the bank commissioner, and is recognized and treated by him as one having authority, the mere omission or neglect of the commissioner to formally issue a written certificate of authority will not exempt the officers of the bank from an observance of the requirements of the banking law, or excuse them for violations of the same.

Same—Same—Same—Same—Estoppel.*—Where such a bank is duly chartered, and holds itself out to the public as a banking institution, receiving money on deposit, and otherwise transacting a banking business, and where the officers, having knowledge of the manner in which the bank is doing business, make reports to the bank commissioner upon demand, showing the character of the business done, they cannot be heard to deny that the bank is duly organized and doing business under the laws of the state; and such officers become liable to punishment for a violation of any of the penal provisions of the banking law, the same as though a formal certificate of authority had been issued to it by the bank commissioner.

Same—False Reports—Criminal Liability of Officers—Jurisdiction.—Where a false report or false statement of the condition of the bank is made, subscribed, and sworn to by an officer of a bank in one county, and is then transmitted to and received by the bank commissioner in another county, in which his office is held, the jurisdiction of the offense is in either county.

Same—Same—Same—Intent.†—If the report or statement is false, and known to be such, and is made with intent to deceive the bank

*See notes at end of case.

†See *Gerner v. Mosher et al.* (Neb.), 1 Bank. Cas. 457.

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commissioner or other persons as to the financial condition of the bank, the person making it is guilty, although he may not have intended to injure the bank or defraud its depositors.

Case at Bar.—The evidence examined, and *held* to be sufficient to sustain the verdict and judgment.

(Syllabus by the Court.)

APPEAL by defendant from Marion county district court.
Affirmed.

King & Kelley and *Keller & Dean*, for appellant.

A. A. Godard, Atty. Gen., J. T. Dickerson, Co. Atty., and G. F. Grattan, for the State.

JOHNSTON, J. In an information containing 11 counts, Harry E. Mason and another were charged with making false entries in the books of the First State Bank of Marion, of which Mason was president, and also of making false statements and reports to the bank commissioner in respect to the financial condition of the bank at stated times. A separate trial was had, at which Mason was convicted of the offenses charged in three of the counts. One was the entry in the books of the bank of a general deposit account under the name of Levi Oglesberger, which was continued for more than a year, and which made it appear that Oglesberger was making deposits and checking out funds from time to time, when in fact he was a myth, and the account fictitious; another was the making of a false statement and report to the bank commissioner on the financial condition of the bank at the close of business on December 27, 1897; and the remaining one was falsely entering in the books as a credit of the bank a certain check for \$1,800, which was forged and fictitious, and known to be such, and that it was done with intent to deceive the bank commissioner and other persons. The punishment imposed was imprisonment for one year on each of the two charges first named, and on the last it was a fine of \$100.

The first and principal ground urged for reversal is an alleged failure of proof. In the information it was alleged

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that the bank was incorporated under and by virtue of the laws of Kansas, and that it was carrying on the banking business under the banking laws of the state. It was averred that Mason was president of the bank, and that as such he committed the offenses charged against him.

The contention is that it was essential for the state to prove that the bank was incorporated in the manner provided by law, and that it was authorized to transact and was carrying on business in the manner authorized by the law relating to banking. The bank was incorporated in 1894, at which time it made a statement to the bank commissioner in attempted compliance with section 5 of chapter 43 of the Laws of 1891, but the statement for some reason was unsatisfactory to the bank commissioner, and he then refused to issue a certificate of authority. This statement, among others, was made by the bank commissioner as a witness, and upon cross-examination he appears to have stated that a certificate was not thereafter issued to the bank. He testified, however, that the bank carried on business under his supervision and control; that he caused examinations to be made of its business, and called for reports from time to time, which were made. During the year 1897 and a portion of 1898, when the offenses were alleged to have been committed, the officers of the bank made regular reports to the bank commissioner, when required, making at least four such reports during 1897 and one prior to May, 1898. During that time examinations were made, and the business was carried on as though it were an authorized bank, and it was treated as such by the bank commissioner. The organization of the bank was completed in 1894; that is, the steps necessary to obtain a charter and make it a corporate body were then taken. Seven persons associated themselves together to conduct a banking business, took a corporate name, fixed the capital stock at \$10,000, which was duly subscribed by stockholders, whose names and residences were given, six of whom were residents of Kansas.

Banks—
Beginning of
Existence—
Failure to Issue
Certificate of
Authority—
Criminal
Liability of
Officers.

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The articles of association were duly acknowledged, and were filed as the charter of the company with the secretary of state. Section 3 of the banking act provides that the existence of the bank as a corporation shall date from the filing of its charter. It contains a proviso that the bank, however, shall transact no business except the election of officers, the taking and approving of official bonds, the receipts of payments on account of subscriptions to capital stock, and such other business as is incidental to its organization, until it has been authorized by the bank commissioner to commence the business of banking. Other provisions of the act are that, if the bank commissioner, upon examination, finds that the bank has been duly organized, and has complied with the provisions of the law, he shall issue to it a certificate of authority. Sections 5, 16. It is made unlawful for any individual, firm, or corporation to transact a banking business without first having received a certificate of authority, and any person violating this provision individually or as interested party in any association or corporation is subject to prosecution, and to a penalty of both fine and imprisonment. From these provisions it is argued that, because no certificate was issued, no corporation was proven, and that, therefore, the prosecution must fail. However important the issuance of a formal certificate may be, it would hardly seem that the defendant was in a position to question the regularity of the organization, or to avail himself of defects of incorporation. Ordinarily, the regularity of corporate organization is a matter between the corporation and the state, and no one but the state can challenge the regularity of such organization. It is the state which alone can incorporate, and it may waive an irregularity, or acquiesce in a usurpation. The remedy for these wrongs rests with the state alone, and the legal existence of the corporation is not open to collateral attack. A statute exists authorizing the organization of such a bank. An attempt was made to organize under the statute, and the bank for a series of years conducted a banking business

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unchallenged by the state, and as if it had been legally organized. Granting that there is a defect in the organization, the bank would at least be a *de facto* corporation. So long as the state acquiesced in its existence, and in its exercise of corporate functions, it would be governed by the same legal principles as though it was a corporation *de jure*. Pape v. Bank, 20 Kan. 440. An officer who helped to organize the corporation, and who has been connected with it continuously for a series of years will hardly be allowed to shield himself from the penalty of violated law because of irregularities and defects in the organization. Then, again, the essential steps in the process of incorporation are those which precede the filing of the charter, as the statute declares the existence of such bank as a corporation dates from the filing of the charter. The corporation is then *in esse* authorized to exercise certain corporate functions, but before other corporate powers may be exercised certain other things must be done. The failure to do the latter things subjects the bankers to punishment, but does not extinguish the corporate existence of the bank. Another, and a controlling, consideration is the fact that the bank commissioner, whose duty it was to issue a certificate of authority, recognized and treated the bank as one having authority. The state claims that the testimony does not bear the interpretation that no certificate was ever issued, but rather that there was a refusal at the time of the first application and report. On this point the evidence is meager and unsatisfactory, but, assuming that no formal certificate was issued, it is abundantly shown that the bank carried on business for years with the consent and under the authority of the commissioner. There was not only actual authority, but it was accompanied by supervision and control, at least during the period when the offenses charged were committed. There being actual authority, will the inadvertence or neglect of the commissioner to deliver written authority exempt the officers from an observance of the statutory provisions regulating banking? If the commissioner overlooked or

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failed to issue a formal certificate, and should, after supervising the business of the bank for years, and treating it as though it had authority, undertake to prosecute the defendant for doing business without a certificate, would the latter concede, or any one claim, that authority was lacking, or that the mere omission of the commissioner to write out the certificate would subject the defendant to prosecution and punishment? We think not. The fact that the real authority granted was not formally expressed in writing did not make it an unauthorized bank, nor absolve the banker from the requirements and penalties of the banking law. This is apparent, too, from the provisions of section 36 of the act, which provides that "any individual, firm or corporation who shall receive money on deposit, whether on certificate or subject to check, shall be considered as doing a banking business, and shall be amenable to all the provisions of this act." We think the court ruled correctly when it instructed the jury that if the evidence proved beyond a reasonable doubt that the bank was duly incorporated under the laws of the state, "that it held itself out to the public as a banking institution, that it received money on deposit either on certificate or subject to check, and that the officers made reports to the bank commissioner when demanded, which reports purported to show that said First State Bank of Marion was a bank and doing a banking business, * * * the officers of such bank, who had knowledge of the manner in which such bank was doing business, cannot be heard to deny that said bank was duly organized and doing business under the laws of the state of Kansas, and such officers would be liable to punishment for a violation of any of the penal sections and provisions of said banking laws of the state, the same as though said bank had had a certificate from the bank commissioner directly authorizing it to do a banking business."

Same-Same-
Same-Same-
Estoppel.

The next contention is that the offense attempted to be charged in the third count of the information was shown to

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have been committed in Shawnee county, and of which there could be no conviction in Marion county. The charge is that in Marion county he did subscribe to and make a certain written report and written statement of the financial condition of the bank to the bank commissioner, and setting forth wherein it was false. Under section 14 of the act it is provided that every officer, director, agent, or clerk of a bank doing business in Kansas, "who willfully and knowingly subscribes to or makes any false report or false statement or entry in the books of such bank, or knowingly subscribes or exhibits any false writing or paper, with the intent to deceive any person as to the condition of such bank, shall be punished," etc. The defendant subscribed to and made the statement and report in Marion county, and then transmitted it to the bank commissioner, whose office is held in Topeka, Shawnee county. The principal steps in the transaction were taken in Marion county. The statement and report were prepared there. It was subscribed and sworn to in Marion county, and before a notary public of that county; but of course it was forwarded to, and received by, the bank commissioner in another county. It therefore may be said that the offense has been committed partly in each of the counties named, and under the provisions of section 23 of the Criminal Code the jurisdiction is in either county.

None of the objections to evidence can be sustained. We think the books of the bank offered in evidence were sufficiently identified, and that the testimony complained of was properly admitted.

Complaint is made of the rulings of the court in charging the jury, and especially of some general comments in the opening part of the charge. The court remarked on the interest of the public in safe depositories, the passage of the banking law, and the reasons for its enactment, the purposes designed to be subserved by different sections thereof, the duties of the bank commissioner and of the officers of the bank. The remarks along this line, we think,

Same—False
Reports—Crim-
inal Liability of
Officers—Juris-
diction.

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were unnecessarily extended, but we fail to see anything in them that is prejudicial to the defendant, or furnishes any ground for reversal. Nor do we see any good ground to complain of the instructions of the court with reference to the intent with which the offense was committed. The jury were told that the officer who verifies the report made to the bank commissioner should know whether it is in fact true and correct, and that he cannot afterwards be heard to say that he does not know the facts, unless he was himself deceived. The jury were also told that the law presumes a man intends the legitimate consequences of his acts, and, if the natural and probable consequence of an entry in the books, or the report made, is to deceive the officers, or bank commissioner, or other persons, they might presume that it was made with that intent. In this connection it was said, "It is no defense to a wrongful act knowingly and intentionally committed that it was done with an innocent intent." If the entry, report, or statement is false, and is made with the intent to deceive the commissioner or other persons as to the condition of the bank, the offense is committed, although the person making it may not have intended to injure the bank, or defraud its depositors; and that was the sense in which the quoted instruction was used. Proof had been offered by the defendant that he did not intend to wrong or injure the bank, and this was the innocent intent to which reference was made. The court in other parts of the charge stated that: "It was not the purpose of the legislature to punish an officer who, through an honest mistake, makes an entry in one of the books or reports of the bank which he believes to be true when it is in fact false. It follows, therefore, that in order to convict the defendant, you must find that he not only made a false entry in one of the books or reports of the bank, but also that he knew the entry to be false when he made it." We think the law of the case was fairly presented to the jury, and that no error was committed in the rulings on requests made or in the instructions

Same—Same—
Same—Intent.

Case at Bar.

Notes

given. The evidence sufficiently sustains the verdict, and, perceiving no error, the judgment will be affirmed.

SMITH, J., concurs.

DOSTER, C. J. I concur in the decision of this case, but I do not approve to the extent stated by MR. JUSTICE JOHNSTON the doctrine that the state only can raise the question of the validity of corporate organization. If the objectionable portion of the opinion can be understood as applying to matters of mere regularity of corporate organization, it is, perhaps, not subject to criticism; but I fear that it may not be so understood. It seems to me to give countenance to the idea that questions as to the legal validity of corporate organization, and hence of corporate power, can only be raised by the state. I do not believe in that doctrine. All the justices concurring.

NOTES.

Officers—Ettoppel to Deny Corporate Existence.—It is well settled that an officer of a corporation is not allowed to question the legal existence of his corporation. *McFarland v. West Side Imp. Ass'n*, 53 Neb. 417, 73 N. W. 736; *Bushnell v. Consolidated Ice Machine Co.*, 138 Ill. 67; *Haynes v. Brown*, 36 N. H. 545; *Heald v. Owen*, 79 Iowa 23; *Barto v. Nix*, 15 Wash. 563, 46 Pac. Rep. 1033; *Hall v. Westchester Pub. Co.*, 180 Pa. St. 561; *Curtis v. Meeker*, 62 Ill. App. 49; *Gillette v. Meredith*, 103 Iowa 155, 72 N. W. 443; *United Growers' Co. v. Eisner*, 47 N. Y. Supp. 906, 22 App. Div. 1; *Anderson v. Thompson*, 51 La. Ann. 727, 10 Am. & Eng. Corp. Cas., N. S., 511, 25 So. Rep. 399; *Canfield v. Gregory*, 66 Conn. 9, 33 Atl. Rep. 536; *Tuckaseegee Mining Co. v. Goodhue et al.* (N. Car.), 4 Am. & Eng. Corp. Cas., N. S., 492, 24 S. E. 797, 118 N. Car. 981; *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181; *Bates v. Wilson*, 14 Colo. 140; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380; *Weinman v. Wilkinsburg, etc., R. Co.*, 118 Pa. St. 192; *Beal v. Bass*, 86 Me. 325; *Close v. Greenwood Cemetery*, 107 U. S. 406. The heir at law of an officer of a corporation is, as a privy in estate estopped to deny legal right of the corporation to hold land which his ancestor had contracted to hold in trust for the corporation until its organization. *Tuckaseegee Mining Co. v. Goodhue*, 118 N. Car. 981, 4 Am. & Eng. Corp. Cas., N. S., 492.

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COMMERCIAL BANK

*v.*CHATFIELD *et al.**(Supreme Court of Michigan, Nov. 7, 1899.)*

Jurors—Harmless Error.—Error in excusing a juror is not ground for reversal, where it does not appear from the record that it was prejudicial.

Loan on Insufficient Security—Conduct of Bank Director—Motive and Care—Evidence.—Where the question is whether a bank director acted in good faith, and exercised due care and prudence in approving a loan on insufficient security, evidence to show that the borrower, prior to the loan, informed the director that he wanted the money to put into a mining venture is admissible.

Same—Liability for Negligence of Co-Directors.—A bank director acting in good faith in approving a loan on insufficient security cannot be held liable for the negligence of the other directors in approving such loan.

Care Required of Bank Director.*—The director and president of a bank, in supervising and guarding the interests intrusted to him as such, is charged with a duty of fidelity and prudence such as a careful man would exercise in his own affairs of like magnitude and importance.

Negligence—Liability of Director.*—A bank director may be liable for loss occasioned by his negligence in approving a loan on insufficient security, though he acted in good faith.

ERROR by plaintiff to Bay county circuit court. *Reversed.*

T. A. E. & J. C. Weadock, for appellant.

John L. Stoddard, for appellees.

MOORE, J. The plaintiff has appealed from a judgment rendered in the court below in favor of defendants. The case was tried by a jury. The plaintiff sued the defendants to recover the sum of \$6,000, taken by defendant Wilder, who was then its cashier. The money was obtained as follows: \$1,500 in September, 1895,

Case Stated.

*See Warren *et al. v. Robinson et al.*, 1 Banking Cases, 541, and note, 564 *et seq.*

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\$3,500 in April, 1896, and \$1,000 in June, 1896. It is claimed that because of the negligent acts of defendant Chatfield, who was a director of the bank, and part of the time its president, he is liable to the bank for this money. The record discloses that prior to June, 1895, defendant Wilder had been connected with various banks, and had been a bank examiner. He lived at Flint. At the request of the directors of the bank, he met them at their place of business to confer with them about becoming the cashier of the bank. In June, 1895, he was employed as cashier of the bank, and entered upon his duties. The bank had nine directors. It does not appear to have had a discount committee, who passed upon the loans before they were made; but, after the loans had been made by the cashier, they were reported to the board of directors at its next meeting. One of its by-laws required its directors to elect "a committee of three persons, whose duty it shall be to examine, at least every three months, the affairs of the bank, count its cash, and compare its assets and liabilities with the general ledger," etc., and report to the board of directors. It is the claim of the bank that Mr. Chatfield, knowing that the cashier was irresponsible, allowed him to take these various sums of money without adequate security, and without consulting his fellow directors; that the directors did not know, until in January, 1897, that these sums of money had been taken; and, while they do not charge Mr. Chatfield with profiting by the transaction, they claim he did not exercise that care and prudence that the law required him to exercise. It was the claim of Mr. Chatfield that he did not know Mr. Wilder until he entered upon his employment as cashier; that he (Chatfield) had nothing more to do with loaning the funds of the bank or managing its assets than the other directors; that, before the first \$1,500 was obtained, Mr. Wilder said he desired to borrow some money, and assign as collateral a life insurance policy of \$7,500, and would like Mr. Chatfield to hold the collateral for the bank, as it would not be proper for the cashier to do so. He says he believed Mr. Wilder

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was entirely responsible, and informed him it would be all right, so far as he was concerned; and later Mr. Wilder gave his note to the bank for the sum of \$1,500, stating in the note the collateral was with Mr. Chatfield. He claims the money was checked out by Mr. Wilder in the usual course of business, and the note was put with the other notes of the bank. It was entered in the bank books just as all other notes were, including the collateral loan register; and this note, among others, was on the list which was read to and approved by the board of directors at its next meeting, which was substantially the course with reference to the additional loan of \$3,500. He says the renewals of these notes were made according to the usual course of business, and were read to the board of directors from the list of notes; that the notes given by Mr. Wilder were among the other assets of the bank when the examining committee made its examinations. He also claims, as to the last \$1,000, that he had no knowledge Mr. Wilder had taken it, or proposed to take it, until after it was taken. He insists he had no portion of the money, and had no interest in Mr. Wilder's business affairs, and that he acted in the utmost good faith; and that the other directors knew, or should have known, about these loans to Mr. Wilder.

The first assignment of error relates to the excusing of a juror for cause when he was not disqualified. The record does not show that because of this act the plaintiff was prevented from having a jury drawn from the regular panel, or that he had exhausted his peremptory challenges. It is not shown he was prejudiced by the fact that the juror was excused. The case is ruled against the appellant by *Mining Co. v. Johnston*, 23 Mich. 36; *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Torrent v. Yagen*, 52 Mich. 506, 18 N. W. 239; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *People v. Aplin*, 86 Mich. 393, 49 N. W. 148.

Plaintiff sought to show that Wilder informed Chatfield

Jurors—Harm-
less Error.

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he wanted the money to put into a mining venture, but was not permitted by the court to do so. We think the testimony was competent, as bearing upon the good faith of Mr. Chatfield, and whether he had exercised the care and prudence required of a director in approving a loan.

Exception was taken to the remarks of the court during the trial which are said to have prejudiced the plaintiff. As the case must be reversed for other reasons, which will appear herein, we do not think it necessary to discuss this feature of the case, because on the new trial no such thing is likely to again occur. The rule is stated in *Hine v. Bank* (Mich.) 78 N. W. 471.

The other questions necessary to be considered grow out of the refusal of the trial court to give certain of plaintiff's requests to charge, and to the general charge of the court.

Request No. 4 reads as follows: "If you find that the defendant Chatfield consented to the defendant Wilder's taking money from the bank upon his note, with the insurance policy mentioned as collateral, and that such collateral was not, in the exercise of ordinary judgment, believed by said Chatfield to be good for such amount of money, then for just so much as you find was permitted to be taken, you will find a verdict for the plaintiff." The court refused to give this request, and several others, which read much like it. We think this refusal was proper, for the reason that the requests ignore the claim of defendant Chatfield that the loan was presented in the usual course of business to the board of directors, and approved by them. If Mr. Chatfield's claim is true, he cannot be held liable for the negligent acts of the other directors if the acts were negligent.

The court refused to give the following requests: "As a director and as president of the bank, the defendant Chatfield was charged with a duty of fidelity and prudence such as a careful man would exercise in his own affairs of like magnitude and importance, and if you find that, by reason of his

Loan on Insufficient Security—
Conduct of Bank Director—
Motive and Care—
Evidence.

Same—Liability
for Negligence
of Co-Directors.

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neglect to exercise such fidelity and prudence the bank has lost, then you will find the amount, and for such amount a verdict for the plaintiff. Mr. Chatfield, as director, was required to exercise such degree of supervision and diligence as the situation and nature of the business of the bank required. It was his duty to watch over and guard the interests committed to him. In fidelity to his oath, and the obligation he assumed, he should do all that a prudent and careful man ought to do for the protection of the interests of others intrusted to his charge, and, if he failed to do this, and by reason of such failure the bank suffered a loss, you will find the amount of such loss, and a verdict therefor for the plaintiff." And charged the jury: "There has been much law cited here in this case on both sides of it, and I find myself unable to agree with the attorneys on either side; and I charge you, as a matter of law, that if Chatfield acted in good faith, believing that Wilder would pay that note, and was fairly responsible for it, that he is not liable. * * * Now, gentlemen of the jury, you will retire to your room, and determine the simple question if Mr. Chatfield, in this matter, has acted in good faith. If he did, you will find a verdict in his favor." We think the court erred in his understanding of the law. We also think counsel's requests ignore the claim of defendant that the loan to Wilder came to the knowledge of the other directors, and was ratified by them. As before suggested, Mr. Chatfield can be held only for his own negligence, and is not liable for the negligence of his co-directors. If the requests had been modified so as to allow the jury to take cognizance of the defendant's claim, by way of defense, that the directors had knowledge of the loan, and ratified it, they should have been given as a correct statement of the law. *Briggs v. Spaulding*, 141

U. S. 132, 11 Sup. Ct. 924; *Stearns v. Lawrence*, 28 C. C. A. 66, 83 Fed. 738; *Dykman v.*

Care Required
of Bank Director.

Keeney (N. Y. App.) 48 N. E. 894; *Williams v. McDonald* (N. J. Err. & App.) 7 Alt. 866; *Williams v. McKay* (N. J. Ch.) 18 Atl. 824; *Mining Co. v. Ryan* (Minn.) 44 N. W.

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56; *Bank v. Reed*, 36 Mich. 263; *Ang. & A. Corp.* (11th Ed.) § 314; 3 *Thomp. Corp.* § 4104; *Reid, Corp. Finance*, § 223; *Elliott, Priv. Corp.* § 239. While we do not regard it as error that the requests, as framed, were not given, for the reason before stated, we do think it was error for the court to say, in effect, that, if Mr. Chatfield acted in good faith, he

Negligence
Liability of
Director.

would be excused from liability whatever his negligence. We do not deem it necessary to discuss the other questions. Judgment is reversed, and new trial ordered. The other justices concurred.

BACON

v.

UNITED STATES.

(*Circuit Court of Appeals, Eighth Circuit, September 25, 1899.*)

National Banks—False Reports Made Voluntarily.*—The making of a false report of the condition of a national bank to the comptroller of the currency may be a crime, although the report is made voluntarily, and not in pursuance of a call or request from the comptroller of the currency.

Unreasonable Searches and Seizures Constitutional Inhibition—Evidence.—The inhibition found in article 4 of the amendments of the federal constitution, and in many state constitutions, against unreasonable searches and seizures is a limitation upon the power of the state to make them for its own benefit, and has no reference to unauthorized acts of individuals; and in the prosecution of the president of a national bank for making a false report of its condition to the comptroller of the currency, an official letter from the comptroller to defendant as president of the bank is admissible as evidence for the government, although it had been wrongfully taken by some one from a locked box marked "James H. Bacon" (the defendant). "Private Papers," before the letter reached the hands of the federal district attorney.

Bank Books as Evidence for the Government.—In such prosecution, the books of the bank, having been properly identified as

*See notes at end of case.

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such, were admissible against defendant, without it being shown that they had been correctly kept; as the presumption is in favor of their correctness.

Criminal Intent—Evidence—Preceding Reports.—In such proceedings, a preceding report of the condition of the bank to the comptroller of the currency, attested by defendant as its president, and containing a false entry reporting an overdraft as so much cash on hand, was admissible to show with what intent any false entry found in the false report alleged in the indictment was made by defendant; as the bank examiner who discovered such false entry testified that he had called defendant's attention to the error within four months preceding the making of the false report alleged in the indictment.

Overdrafts—Overdraft Notes.*—An overdraft arises when a customer of a bank draws from the bank more money than is standing to his credit in his account with the bank, although the amount overdrawn is arranged for or covered by a note in the hands of the bank, called an "overdraft note."

Same—Same—Reports.—When the comptroller of the currency calls upon a bank for a statement of overdrafts, its report, to be truthful, and in conformity with law, should include overdrafts covered by what are termed "overdraft notes," unless such notes have been discounted, and their proceeds actually carried to the credit of the depositor on the books of the bank.

Harmless Error.—A judgment will not be disturbed because of harmless error.

ERROR by defendant to the circuit court of the United States for the district of Utah. *Affirmed.*

George Sutherland and *John M. Zane* (*Hiram E. Booth*, on the brief), for plaintiff in error.

John W. Judd, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. James H. Bacon, the plaintiff in error, was indicted and tried in the circuit court of the United States for the district of Utah for certain offenses denounced by section 5209 of the Revised Statutes of the United States. The indictment under which he was tried contained eight counts, but at the conclusion of the evidence the court withdrew from the consid-

Case Stated.

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eration of the jury the first, second, fifth, and seventh counts, and a conviction was had on the third and fourth counts only. The charge contained in the third and fourth counts, of which the accused was found guilty, was, in substance, that in a report made by him, as president of the American National Bank of Salt Lake City, to the comptroller of the currency, on December 28, 1893, which purported to show the true condition of said bank on December 19, 1893, he had stated under oath that the sum due from individual depositors to said bank on account of overdrafts was only \$5,755.93, whereas in truth and in fact the amount then due on account of overdrafts was \$14,479.82, as the defendant well knew, and that such false report was made with intent to injure and defraud said bank, and to deceive any agent who might be appointed by the comptroller of the currency to examine its affairs. It was admitted by the defendant below in the course of the trial—and concerning that fact there was no controversy—that the books of the American National Bank of Salt Lake City showed overdrafts on the part of individual depositors at the close of business on December 19, 1893, which amounted in the aggregate to \$14,479.82. But it was claimed by the defendant that certain depositors whose accounts appeared to be overdrawn at that time to the amount of \$8,723.89 had theretofore executed and delivered notes to the bank to cover any possible overdraft of their respective accounts which might subsequently occur, and that in making up his report to the comptroller on December 28, 1893, the defendant had deducted the latter sum from the total amount of the overdrafts as disclosed by the books, and had reported it to the comptroller of the currency under the head of loans and discounts, although the so-termed overdraft notes had not in fact been discounted, and the proceeds thereof passed to the credit of the respective makers on the books of the bank. The defendant further claimed that he had so reported a portion of the overdrafts amounting, as aforesaid, to \$8,723.89, because he had been advised previously by a bank

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examiner by the name of Lazear that that was the proper way to report overdrafts when the bank held notes representing the same, and that he had so acted in the utmost good faith without criminal intent. He was contradicted on this point, however, by Lazear, from whom he claimed to have received the aforesaid advice; the latter testifying, in substance, that previous to the commission of the alleged offense he had given no such advice to the accused, but had instructed him, on the contrary, that advances to customers appearing on the books as overdrafts should be so reported to the comptroller of the currency. The trial judge allowed the jury to decide this controverted issue of fact. He also allowed the jury to determine, in the light of all the testimony, whether the bank, on December 19, 1893, did in fact hold notes to the amount of \$8,723.89, representing a portion of the aggregate overdraft which the books then disclosed; and he instructed the jurors, in substance, that if they believed that a portion of the overdraft was thus reported by the accused as loans and discounts, in pursuance of an honest belief that that was the proper way to report them in making the report complained of, then there was no such intent to defraud or deceive as would support a conviction. In view of these facts, we must assume either that the jury disbelieved the testimony tending to show that the bank held notes as claimed on December 19, 1893, representing a portion of the overdraft, or that they found that, even if the bank did hold such notes, the accused was well aware that the entire overdraft disclosed by the books on that day should have been reported as an overdraft, and that the evidence established an intent on the part of the defendant either to deceive or defraud.

With this explanation of the general features of the case, we proceed to consider the alleged errors that have been called to our attention. When the prosecution, to sustain the issue on its part, offered in evidence the copy of the report referred to in the indictment, purporting to show the condition of the American National Bank of Salt Lake City

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on December 19, 1893, which was duly authenticated under the hand and official seal of James H. Eckels, comptroller of the currency, and in connection therewith offered the original report, the signature of the defendant to the original report seems to have been admitted by his counsel to be genuine. Both the original report and the copy thereof were objected to, however, by the defendant below on the ground that the prosecution had not shown that the report was made in pursuance of a request therefor regularly issued by the comptroller of the currency, which objection was by the court overruled, and an exception was saved. Section 5211 of the Revised Statutes requires every national banking association to make not less than five reports each year to the comptroller of the currency, according to a form prescribed by that officer, which reports, as the statute declares, must be verified by the oath or affirmation of the president or cashier of the association in whose behalf the report is made, and attested by the signature of at least three of its directors. The statute further provides that such reports shall be transmitted within five days after the receipt of a request therefor from the comptroller, and that the latter officer shall have power to call for special reports whenever, in his judgment, the same are necessary. The objection to the report which was made by the defendant was, in substance, that it had not been shown that the report was made in obedience to a requisition from the comptroller, the claim being that by the provisions of section 5209 of the Revised Statutes, under which counts 3 and 4 of the indictment were framed, no offense is committed if a bank officer does make a false report to the comptroller of the currency in relation to the condition of the bank, unless the report is made in obedience to a request from the latter officer. It will be observed that section 5209, in defining the offense of making a false report, contains no such limitation as that sought to be imposed. The language of the law is general that "every president, director, cashier, teller, clerk or agent of any association * * * who makes any false entry in any book, report or statement of the association, with intent," etc., "shall be

National Banks -
False Reports
Made Voluntarily.

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deemed guilty of a misdemeanor, * * *'' which language may as well include a false report voluntarily made by a bank official to the comptroller of the currency to influence his action, and accomplish some fraudulent purpose, as a false report made in pursuance of a call or request from that officer. We perceive no reason why a false report or statement made voluntarily to the comptroller of the currency in relation to the condition of a national bank for the purpose of inducing some action on the comptroller's part, or of forestalling certain action which he contemplates taking, should not be deemed an offense, as well as the making of a false report pursuant to a call or request from that officer, provided the act is done with the intent specified in the statute. The law was designed, we think, to prevent bank officials and employees from making any false entry in the books of the bank, and from making any false representations concerning its financial condition and resources in any report or statement which they may see fit to make in behalf of the bank to the comptroller of the currency, or to persons appointed to examine its condition, for the purpose of influencing their action. The reasons given in *U. S. v. Booker*, 80 Fed. 376, for holding that the report referred to in section 5209 is not restricted to the reports specified in sections 5211, 5212, but comprehends as well other reports made in behalf of national banking associations, commend themselves to our judgment as in all respects sound. Moreover, if it should be conceded that section 5209 has reference only to false reports that are made to the comptroller pursuant to his request, we should nevertheless feel constrained to hold that, when the report in this case was admitted in evidence, the proof was adequate to create a presumption that the report had been made in obedience to a request from the comptroller, and that no further evidence on that point was necessary to warrant its admission. It emanated from a high public office. It was made on a form that had been prescribed by the comptroller of the currency for use by national banks when reports as to their condition were called for. The copy of the report was

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duly authenticated under the hand and seal of that officer as a copy of an original report, properly on file in his office; and upon the assumption that the law affords no warrant for the making and filing of such reports in the office of the comptroller without a precedent request a presumption naturally arose from the fact that the report had been accepted and filed that it had been duly called for by the comptroller. We think, therefore, that the objection to the introduction of the report was rightly overruled.

Misbehavior of the attorney for the United States in the presence of the jury is next relied upon to secure a reversal of the judgment below. This charge is predicated upon the

Unreasonable
Searches and
Seizures—
Constitutional
Inhibition—
Evidence.

following occurrence: In the course of the trial a letter from the comptroller of the currency to James H. Bacon, the defendant, as president of the American National Bank, was offered in evidence by the government; and upon its being established to the satisfaction of the court that the letter had been taken by force from a locked box marked "James H. Bacon. Private Papers," while the box was in the custody of officers of the law of the state of Utah, and that it had subsequently been turned over to the United States district attorney, the court ruled that the letter was inadmissible. Thereupon the attorney for the prosecution laid the letter upon the table before the defendant's attorney, and asked him to produce it. The trial judge ruled that the defendant could produce it or not, as he might elect, and in view of that ruling the letter was not read. Such was the misconduct of the attorney on account of which complaint is made. Other portions of the record disclose the following facts which are pertinent to the exception now under consideration: The American National Bank of Salt Lake City ceased doing business on February 24, 1894, and on that day turned over all of its books, papers, and assets to the defendant below, who immediately organized a state bank known as the Bank of Salt Lake, and in this way the papers, books, and assets of the defunct institution passed into the custody of the newly-organized state bank.

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The latter bank subsequently became embarrassed, and receivers thereof were duly appointed in the course of legal proceedings instituted against it in the courts of the state. These receivers, having obtained possession of the books and papers of the American National Bank, including the afore-said letter addressed by the comptroller of the currency to its president, gave the federal authorities access thereto when an investigation into the affairs of the last-named bank was inaugurated, which resulted in an indictment being returned against the defendant. In the course of this investigation all of the books and papers in question passed into the custody of the United States marshal for the district of Utah, with the consent of the receivers of the state bank, where they remained until they were used upon the trial of the defendant in the lower court. Upon this state of facts we think that the complaint made of the misconduct of the attorney for the United States is without merit, and that the objection subsequently made to the use of the books and papers of the American National Bank as evidence against the accused, because of the manner in which they had been obtained by the prosecution, is equally untenable. The letter which was written by the comptroller of the currency to the defendant as president of the American National Bank was admissible in evidence against the defendant if it threw any light upon the acts charged in the indictment, and the ruling of the learned trial judge in excluding it would seem to have been erroneous, in view of all the facts which the bill of exceptions discloses. It was in no sense a private paper of the defendant, because it was addressed to him as president of the American National Bank, and formed a part of the official correspondence between the comptroller and said bank; and although it be true that some one had extracted it from a locked box marked "James H. Bacon. Private Papers." while the box was in the possession of the receivers of the Bank of Salt Lake, yet, as no officer of the government was concerned in that act, we are of opinion that such fact did not

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affect its admissibility. It is held very generally that, if an individual by an illegal search or seizure obtains possession of an article or document, the state may nevertheless make use of the same as evidence against the person from whom they were wrongfully obtained to convict him of a crime; and that the inhibition found in article 4 of the amendments to the federal constitution, and in many state constitutions, against unreasonable searches and seizures is a limitation upon the power of the state to make such searches and seizures for its own benefit, and has no reference to unauthorized acts of individuals. *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; *Shields v. State*, 104 Ala. 35, 16 South. 85; *Com. v. Dana*, 2 Metc. (Mass.) 329, 337; *State v. Flynn*, 36 N. H. 64; 1 Greenl. Ev. § 254a, and cases there cited. This, in our opinion, is a reasonable doctrine, when we remember that the common law has always afforded ample remedies for illegal acts committed by individuals, and that the inhibition against unreasonable searches and seizures found in the organic law owes its origin to acts of that nature which at one time were frequently committed by the sovereign on the pretense that they were necessary for his own protection or the protection of the state. If it be true, then,—as we think it is,—that the letter in question was admissible against the defendant notwithstanding the manner in which it had fallen into the hands of the government, it can scarcely be pretended that the action of the attorney for the United States in laying it down on the counsel table, and then calling for its production, was such misconduct on his part as would justify a reversal of the judgment. There is even less reason for holding that the books of the American National Bank had come into the possession of the government in such a way that they could not be used against the accused for the purpose of convicting him of a crime.

The books of the bank, when they were offered in evidence by the government were further objected to by the defendant

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below on the ground that no testimony had been adduced to show that they had been properly kept. This objection was overruled, and error is assigned on account of that ruling. The government did prove, however, that the books in question were the books of the American National Bank, in which it had been accustomed to keep a record of its daily business transactions, and that the books had been kept according to what is known as the "Boston System" of bookkeeping, by which system original entries are made on slips called "debit" and "credit" slips. The defendant against whom the books were offered was the chief executive officer of the bank, and as such actually had control and direction of its affairs while it was a going concern. Besides, the act of congress under which the bank was organized in effect enjoined that its books should be truthfully kept, since section 5209 of the Revised Statutes, heretofore cited, made it an offense, punishable by imprisonment, for any officer or agent of the bank to make any false entry in its books. In view of these considerations, we are of opinion that a presumption existed that the books in question had been truthfully or properly kept, and that it was unnecessary to fortify that presumption with additional proof, when the books were produced, and proved to be the regular books of account of the bank. We have no fault to find with the rule which is enunciated in some cases that the books of a corporation cannot be used by the corporation without independent evidence showing that they are correct, for the purpose of establishing an indebtedness to itself on the part of its stockholders or directors. *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046. But we are unwilling to sanction the doctrine that in a proceeding against the president of a national bank to convict him of making a false report to the comptroller of the currency concerning its financial condition the books of the bank, although properly identified as such, cannot be used by the prosecution as evidence to show its condition, without first producing other evidence to show

Bank Books as
Evidence for the
Government.

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that they have been truthfully kept, and are in all respects correct. This latter rule would impose a burden upon the government which it should not be compelled to assume. Inasmuch as the act under which national banks are organized makes it the duty of all officers and employees of such institutions to make no entries in their books except such as are correct and truthful, the government should be entitled to rely upon the presumption that such duty has been faithfully performed until the contrary thereof is established.

We have next to consider an exception that was saved to the admission of three reports to the comptroller of the currency concerning the condition of the American National Bank of Salt Lake City, which were made respectively in behalf of the bank on July 12, 1892, May 4, 1893, and July 12, 1893, and antedated the report on which the indictment was based. These reports, though admitted in evidence, are not set forth in the bill of exceptions, which only contains fragmentary portions of certain oral testimony that seems to have been given in relation thereto by a bank examiner by the name of Lazear. An appellate court would probably be justified in refusing to notice the exception in question because of the imperfect condition of the record. We have, however, considered such of the testimony as has been preserved, with a view of ascertaining, as best we may, what influence these reports and the oral testimony in relation thereto may have had upon the result of the trial, and whether it appears with sufficient certainty that a prejudicial error was committed. The bill of exceptions shows that Lazear examined the American National Bank in September, 1893; that in the course of such examination he had the aforesaid reports in his possession, and compared them with the books of the bank, to ascertain if they were correct, and corresponded with the books at the time they purported to have been made; that in the course of that examination he conferred frequently with the defendant, Bacon, who was

Criminal Intent—
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ceding Reports.

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at the time president of the bank, and had attested the reports, and called his attention to mistakes therein, by reason of which they did not reflect the true condition of the bank as shown by its books. The record does not clearly disclose all of the alleged mistakes that were so pointed out, because the reports and much of the testimony in relation thereto have been omitted. It must be presumed, however, in aid of the judgment below, that they were made clear to the trial court by means of the reports and oral testimony. Enough appears in the bill of exceptions to satisfy us that one of the alleged mistakes to which the defendant's attention was especially called by Lazear consisted in a manipulation of the cash in one of the reports, by means of which the amount of cash on hand was exaggerated to the extent of \$3,017.50 by reporting an overdraft to that amount as cash actually on hand. Lazear testified that he called the defendant's attention to this item in the report, and advised him at the time that it was a false entry. It is obvious that the reports to which the objection was addressed, the testimony of Lazear in relation thereto, and his conversations with the defendant concerning the same, were admitted by the trial court solely for the purpose of enabling the jury to decide with what intent any false entry found to be contained in the subsequent report of December 28, 1893, was made by the accused. The trial court charged the jury, in substance, that such was the purpose of its admission, and that the defendant was not on trial for, and could not be convicted of, making a false report other than the one charged in the indictment. The instructions in this particular were in all respects fair and correct. The conclusion which we have formed on this branch of the case is that the trial court was justified in admitting the aforesaid reports in connection with the oral testimony of Lazear in relation thereto, because of the tendency of the evidence to establish the purpose with which the acts charged in the indictment were committed. The false report alleged in the indictment was made within four months succeeding the examination of the bank by

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Lazear, and if it be true that in the course of that examination the defendant's attention was directed to false statements contained in previous reports which he had attested, such testimony would have a natural tendency to convince a jury that the false report complained of in the indictment was not due to ignorance or inadvertence, but was inspired by a fraudulent purpose. This court approved of the admission of similar testimony for the purpose of establishing guilty knowledge in the recent case of *Dow v. U. S.*, 49 U. S. App. 605, 27 C. C. A. 140, and 82 Fed. 904, 909, and upon the assumption which we are forced to make in view of the condition of the record that the reports and testimony of Lazear in relation thereto showed errors and inaccuracies therein to which defendant's attention was invited, no doubt can be entertained that the evidence to which the exception was taken was properly admitted. *Allis v. U. S.*, 155 U. S. 117, 119, 15 Sup. Ct. 36.

A further exception was noted by the defendant's counsel to a portion of the charge of the trial judge wherein he instructed the jury, in substance, that an overdraft arises when a customer of a bank draws from that bank more

Overdrafts—
Overdraft Notes.

money than is standing to his credit in his account with the bank; that such a sum so appearing from a depositor's account to be overdrawn is an overdraft, and should be reported as such in reports made to the comptroller of the currency, although arranged for or covered by a note in the hands of the bank, called an "overdraft note." It is urged that this instruction was erroneous; that, whenever a bank takes a note to secure a possible overdraft in a depositor's account, any sum subsequently overdrawn by the depositor not exceeding the amount of the note should be reported, not as an overdraft, but as a loan or discount; and that the instruction was highly prejudicial to the defendant because if it was true, as he claimed, that the bank held overdraft notes to the amount of \$8,723.89 on December 19, 1893, then the aggregate overdraft on that day was correctly reported, no matter what the books of the bank may

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have shown. The definition of the term "overdraft" which was given by the trial judge is substantially the same as the one formulated by JUDGE SANBORN in *U. S. v. Allis*, 73 Fed. 175, 178, and we think that it was correct, as applied to the state of facts disclosed by the present record, inasmuch as it was not claimed that any of the so-called "overdraft notes," if the same actually existed, had ever been discounted by the bank, and the proceeds thereof carried to the credit of the makers. When a depositor's account with a bank shows that he has drawn and been charged with more money than he has deposited, or more than has been placed to his credit on the books of the bank, it is usually said that his account is overdrawn, and that an overdraft exists. This is the ordinary meaning of the word "overdraft," as used among bankers. It must be presumed, therefore, that when the comptroller of the currency calls upon a national bank for a report of its condition, and, as in the case at bar, asks for a statement of the amount of overdrafts "secured" and "unsecured," he uses the word in the sense last indicated, and desires a statement of the total amount which customers of the bank have drawn in excess of the sums that have been placed to their credit on the books of the bank. Loans that a depositor effects by overdrawing his account are very different from those effected in the usual course of business by discounting commercial paper, and it is doubtless true that the practice of requiring a particular statement of irregular loans of that character in reports made to the comptroller is due to the fact that, if they are shown to be large, they excite suspicion, and tend to impair confidence in the management of the bank, and to insure greater watchfulness on the part of the comptroller. We think, therefore, that when that officer calls upon a bank for a statement of overdrafts, the report, to be truthful, and in conformity with law, should include overdrafts covered by what are termed "overdraft notes," unless such notes have been discounted, and the proceeds thereof actually carried to the credit of the depositor on the books of the

Same—Same—
Reports.

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bank. It follows from what has been said that the instruction complained of was properly given, and that the case was properly left to turn on the intent which had actuated the defendant in misrepresenting the amount of the overdrafts.

Some other exceptions were noted during the trial, which are of less importance than those heretofore considered, and need not be spoken of at length, although they have received due attention. Among the number is one which was taken to the trial court's definition of the phrase "reasonable doubt," but, as the definition given was, in substance, the same as one that was approved in *Dunbar v. U. S.*, 156 U. S. 185, 15 Sup. Ct. 325, the exception cannot be regarded as tenable. A president of another national bank in Salt Lake City, who was familiar with reports made by such banks to the comptroller of the currency, and also with the forms upon which such reports are required to be made, was called by the prosecution to testify as an expert as to the meaning or signification of certain entries in the report of date December 28, 1893, on which the indictment in the present case was based. An exception was taken to the admission of this testimony, and to the admission of similar testimony given by another witness, on the ground that it was not a proper subject-matter for expert testimony, the document being in writing, and the proper interpretation thereof being, as it is claimed, a matter of law for the court. With reference to this criticism it is sufficient to say that it is not suggested that the witnesses in question misinterpreted any of the entries in the report, and to our mind it is obvious that they did not do so. Therefore, if it should be conceded that the duty of construing the report rested upon the court, yet it is clear that no harm was done by admitting the testimony, of which the accused is entitled to complain. Upon the whole, we have reached the conclusion that no legal cause is disclosed by the record for disturbing the judgment of the lower court. We should have been better pleased with the result if the sentence imposed had been less severe, but we are not authorized to re-

Harmless
Error.

Notes

view the action of the lower court in that respect. It must also be borne in mind that the more full and accurate knowledge of all the facts and circumstances attending the commission of the offense which was possessed by the trial judge enabled him, probably, to better determine what was adequate punishment. The judgment below is accordingly affirmed, and the defendant below is hereby ordered to surrender himself to the custody of the United States marshal for the district of Utah on the filing of the mandate in execution of the sentence heretofore imposed by the trial court.

NOTES.

National Banks—Reports—False Entries.—All reports made by a national bank in the due course of its business, not only those required by U. S. Rev. St. § 5211, § 5212, are included under § 5209 prohibiting false entry and imposing a penalty therefor. *United States v. Booker* (C. C.), 80 Fed. Rep. 376.

An indictment under U. S. Rev. St. § 5209 which alleges that defendant, as president of a certain national bank, "did knowingly, wrongfully, and unlawfully make, and cause to be made, false entries in a report or statement," of such bank, being a report of its condition at a designated time, "made to the comptroller of the currency, as required by law to be made," and setting out in full the report and giving in detail the particulars in which the entries were alleged to be false, is sufficient, though it fails to allege that the report was made pursuant to a request of the comptroller, or according to a form or at a time prescribed by him under U. S. Rev. St. § 5211. *United States v. Hughitt*, 45 Fed. Rep. 47.

Same—Same—Same—Listing Overdrafts.—An indictment under U. S. Rev. St. § 5209 will lie against a national bank cashier for listing as legal tender, with intent to deceive the comptroller, an overdraft which he is trying to have made good by the person who drew it. *United States v. Youtsey* (C. C.), 91 Fed. Rep. 864.

But where depositors have arranged with the proper officers for credit and have made overdrafts with their permission, such overdrafts may be listed as "Loans and Discounts." *Graves v. United States*, 165 U. S. 323, 17 Sup. Ct. 393. *Compare* *United States v. Graves* (D. C.), 53 Fed. Rep. 634.

In an action against a national bank officer for making false entries in respect to overdrafts, his testimony that he considered

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overdrafts as loans may be considered by the jury in determining his intent, but it is no defense to such a charge that the overdrafts had been arranged for or secured, or that interest was to be paid upon them by agreement, if such entries were made with criminal intent, every overdraft, whether or not made under such arrangement and such agreement for interest, being a loan, and being required by law and the comptroller's rules to be listed and reported as an overdraft. *United States v. Allis* (C. C.), 73 Fed. Rep. 165.

PIEDMONT BANK OF MORGANTON *et al.**v.*WILSON *et al.**(Supreme Court of North Carolina, May 2, 1899.)*

Promissory Notes—Payment—Sufficiency of Evidence.—The execution of the note sued on was admitted by defendants, and their plea was substantially that of payment, but it was not contended that the note had ever been actually paid, or that it had been canceled or surrendered, and it was permitted to remain in the possession of the plaintiff bank, and, upon its failure, was turned over among its assets to the receiver. The evidence tended to prove simply an executory agreement to pay. *Held*, that a verdict should have been directed for plaintiff.

Same—Same—Authority of Cashier.*—A bank cashier cannot, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note, already held by another bank as collateral security, as such a transaction is not within the ordinary dealings of a bank.

Deposits as Counterclaims—Equity.—Under the statutes of North Carolina a deposit by defendant in the plaintiff bank, made after the bringing of the action, cannot be set up as a counterclaim, and does not entitle the depositor to equitable interference in his behalf upon the insolvency of plaintiff and the substitution of its receiver as party plaintiff.

APPEAL by plaintiff and a defendant from Burke county superior court. *New trial.*

*See extensive *note*, 1 Banking Cases, 611 *et seq.*

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Avery & Ervin, for plaintiffs.

S. J. Ervin, for defendants.

DOUGLAS, J. This is an action upon a promissory note executed by the defendant Wilson to his co-defendant, the manufacturing company, and by it indorsed to the plaintiff. A payment on the note reduced the principal to \$400, which is now due, with interest thereon.

Case Stated.

The defendants, in their answer, contend: "That at the time the said note was executed, and when it was due, the plaintiff held a note on Isaac T. Avery and W. C. Ervin for the sum of \$1,500, to be due January 1, 1895, which he had assigned to the Davis & Wiley Bank; that he had made an arrangement with said bank to allow him \$400 of this note to be used by him in payment of the note sued on in this cause; that accordingly, on the 29th day of December, 1894, he paid to the plaintiff, through its cashier, S. T. Pearson, the \$21.74 as above stated, the plaintiff then agreeing that it would take the \$400 out of the said note of \$1,500 due January 1, 1895; that in accordance with this agreement the Davis & Wiley Bank, January 1st, sent said note to the plaintiff, and it declined to receive it, and allow defendant credit therefor; that this defendant understood and has been informed by the said Isaac T. Avery that, although the said note for \$1,500 was signed by him and W. C. Ervin, the plaintiff bank was the real party who would have it to pay, and that in making the agreement to accept the said \$400 in payment of his note the plaintiff was only paying an indebtedness due from it; that the said Davis & Wiley Bank is still willing the said arrangement shall be made, and the defendant now pleads said agreement and the said indebtedness as a counterclaim in payment in full of said note." The plaintiff, in reply, denied the material allegations of the answer, set up the pendency of a suit by the Davis & Wiley Bank, and pleaded the statute of frauds. The following issue was submitted: "Did the plaintiff bank agree with the defendant J. W. Wilson to take in payment of the balance of the note sued on an interest of \$400 in a \$1,500 note given

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said Wilson by I. T. Avery and W. C. Ervin, and assigned by said Wilson to the Davis & Wiley Bank, and did said Davis & Wiley Bank agree that said plaintiff bank should have the said \$400 interest in the \$1,500 note, and was such \$400 interest in the \$1,500 note ever assigned to the plaintiff bank?" This was answered in the affirmative.

The execution of the note sued on by plaintiffs was admitted, as was also its indorsement by the Morganton Manufacturing & Trading Company. The defendant J. W. Wilson, introduced as a witness in his own behalf, subject to the objection of the plaintiffs, testified as follows: "After execution of the note to the Morganton Manufacturing & Trading Company, on August 24, 1894, witness had a conversation with either S. T. Pearson or G. P. Erwin; thinks it was with Mr. Pearson. (Mr. Pearson was cashier and Mr. Erwin was president of the Piedmont Bank.) The bank had a note on witness of \$421.74, on which the Morganton Manufacturing & Trading Company was surety. Witness was one of the stockholders of said company. Witness had at same time a note on I. T. Avery and W. C. Ervin for \$1,500 (note shown witness, which he says is the note, and note put in evidence), which witness had given to Davis & Wiley (bankers) in payment of a security debt which witness had down there, with the understanding with Davis & Wiley that \$400 of that note could be used by witness in paying off the debt of \$421.74 the witness was due the Piedmont Bank. Witness went into bank, and told them of the arrangement, and paid them the \$21.74, leaving the \$400 unpaid, which they were to collect out of Avery & Ervin, and settle. Witness supposes that the bank did not collect it out of Avery & Ervin as they had promised to do, and they have not paid it up to this time. The plaintiff bank was to take the balance of note for \$400. Ervin & Avery were to pay on the following January \$1,500 and interest on the note Davis & Wiley held, and \$400 of it was to go to the plaintiff bank, and the balance to Davis & Wiley, and the bank agreed to this in payment of \$400. Witness had a talk with some of

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the officers of the bank. The interest on the \$1,500 was paid by the bank. Witness called at the bank to get payment on the Avery & Ervin note when it was due, and the bank officer gave witness to understand that Ervin, the maker, had the money to pay it, so witness made a deed for the property, and tendered it at the bank, and they declined to pay it. All the parties declined to pay it. Suit was then brought upon the \$1,500 note, and that case is still pending. Suit brought in favor of Davis & Wiley on this note. Davis & Wiley are still willing to carry out their part of the contract, and pay them \$400, when the parties pay them the \$1,500." This is the entire testimony of the witness Wilson, who was the only witness examined, as appears in the record. It was all objected to in apt time, admitted by the court, and excepted to by the plaintiffs. The defendants admit that the Davis & Wiley Bank have a suit pending for the \$1,500 note of Avery & Ervin, brought since the commencement of this action. Both notes were in evidence, that of Avery & Ervin bearing the following indorsements: "Jas. W. Wilson." "Pay to the order of G. P. Erwin, Pres't, for collection account Davis & Wiley Bank. O. D. Davis, Cashier." The latter indorsement had been stricken out. At the close of the evidence the plaintiff filed the following requests for instructions: "(1) That if the jury believe the evidence they will answer the issue 'No.' (2) That upon all the testimony the plaintiff is entitled to recover. (3) That there is no evidence of any assignment of any part of the Avery & Ervin note to the plaintiff bank by the Davis & Wiley Bank. (4) That there is no evidence that the plaintiff bank agreed to accept \$400 of the Avery & Ervin note in discharge of the note sued on; on the contrary, the evidence of defendant J. W. Wilson was that the bank 'agreed to collect the Avery & Ervin note, and apply \$400 on the debt sued on, but that the plaintiff bank did not collect the Avery & Ervin note.' (5) That, no consideration being shown for the alleged agreement, it was *nudum pactum*, and void. (6) That, even if there had been a consideration,

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the transaction testified to by J. W. Wilson was, in effect, a promise on the part of the plaintiff bank to pay the debt of Avery & Ervin, and was void under the statute of frauds. (7) That upon the testimony of J. W. Wilson the transaction or agreement with the bank was merely executory, was without consideration, and, being never executed, conferred no liability. If the jury believe that plaintiff bank did as testified by Wilson,—‘agreed to collect’ the Avery & Ervin note, and pay \$400 of the proceeds on the Wilson note, and that the bank did not collect it,—they will find the first issue, ‘No.’ ” The court declined to give either or any of the instructions prayed for by plaintiffs, and plaintiffs excepted to the refusal of the court to give each and every one of the instructions as prayed by plaintiffs. The court charged the jury as follows: “The burden of proving the affirmative of this issue by a greater weight of the evidence is upon the defendants. If the jury find that the plaintiff bank agreed, through its cashier, with the defendant J. W. Wilson, to take in payment of the balance of the note sued on an interest of \$400 in a \$1,500 note given said Wilson by I. T. Avery and W. C. Ervin, and assigned by said Wilson to the Davis & Wiley Bank, and further find that the said Davis & Wiley Bank consented and agreed that plaintiff bank should have the \$400 interest in the said \$1, - 500 note, and that the said Davis & Wiley Bank, in pursuance of said agreement, sent the said \$1,500 note to the plaintiff bank for collection, and that the said Davis & Wiley Bank are still willing to carry out the said agreement, then the jury will answer the issue, ‘Yes.’ If the plaintiff bank did not agree to take in payment of the \$400 balance on note sued on a \$400 interest in the said \$1,500, but only agreed to collect the \$1,500, and apply \$400 of the money collected to the payment of note sued on with the consent of Davis & Wiley Bank, in the event that they were able to collect it, and if the plaintiff bank has been unable to collect the said \$1,500 note, then there would be no payment, and the jury will answer the issue, ‘No.’ If the defendant has failed to

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prove by a greater weight of the evidence the affirmative of the issue, then the jury will answer the issue, 'No.' Judgment was rendered for the defendants, and the plaintiff appealed.

Upon the foregoing facts, we are of the opinion that the plaintiff is entitled to a new trial. The execution of the note having been admitted, the burden shifted upon the defendants of showing matter in avoidance. Their plea is substantially that of payment, but we find no substantial evidence tending to prove actual payment. In arriving at this conclusion we have accepted the defendants' evidence as true, and construed it in the light most favorable for them, as it is our duty to do in a prayer for instruction in the nature of a demurrer to the evidence. *Cox v. Railroad Co.*, 123 N. C. 604, 31 S. E. 848; *Cable v. Railway Co.*, 122 N. C. 892, 29 S. E. 377. At best the evidence tends to prove simply an executory agreement to pay. It is not contended that the note in suit has ever been actually paid, or that it has been canceled or surrendered. It was permitted to remain in the possession of the bank, and was turned over among its assets to the receiver. The testimony of the defendant Wilson that the Davis & Wiley Bank is still willing to carry out its part of the contract, if admissible, tends to prove an executory agreement; while the indorsement on the \$1,500 note shows that it was transmitted to the plaintiff for collection entirely on account of the Davis & Wiley Bank, without admission of any interest whatever belonging to the plaintiff. *Boykin v. Bank*, 118 N. C. 566, 24 S. E. 357; *National Citizens' Bank of New York v. Citizens' Nat. Bank of Raleigh*, 119 N. C. 307, 25 S. E. 971. We are not attempting to pass upon the weight of the evidence, for that function belongs to the jury; but we think that, in the absence of any evidence, more than a mere scintilla, tending to prove the contention of the defendant, on whom rested the burden of proof, the court should have directed a verdict in favor of the plaintiff.

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Spruill v. Insurance Co., 120 N. C. 141, 27 S. E. 39. But, if we are mistaken in our view of the evidence, we are still of the opinion that the alleged agreement was beyond the scope of the agency of a cashier, and without consideration, and therefore void. There is no pretense of consideration. The payment by the defendant Wilson of the \$21.74 was simply the payment of a small part of that for which he was bound. We do not think that a cashier can, without express authority, take in payment of a note a mere verbal assignment of an intangible interest in another note, already held by another bank as collateral security. If the alleged contract operated as payment in full of the note in suit, then the plaintiff bank has absolutely nothing to show for the unpaid debt originally owing to it by the defendants, and still owing by somebody. Such transactions are not within the ordinary dealings of a bank, and cannot be encouraged. It is scarcely necessary to cite authorities as to the effect of a *nudum pactum*, especially when made by an agent. Our view of the case renders it unnecessary for us to discuss the other questions raised by exception. For the reasons above stated, a new trial must be ordered. New trial.

Same--Same--
Authority of
Cashier.

Defendant's Appeal in Same Case.

This is the appeal of the defendant manufacturing company in the preceding case between the same parties, involving, however, an entirely different question of law. The plaintiff brought this action upon the promissory note of the defendant manufacturing company indorsed by said Wilson. The defendant company filed its separate answer, as follows: (1) "That, after the suit was brought in this case by the plaintiff bank, it failed, and the plaintiff L. A. Bristol was made permanent receiver, and is made party plaintiff at this term of the court; that he is now pressing this cause against defendants to create assets in his hands." (2) "That at the time of the failure of said bank, on the 2d of December, 1898, this defendant was a depositor, and had to its credit on the

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books of said bank the sum of \$100.36, which sum is still due and owing to this defendant, and defendant now pleads the said sum of \$100.36 as a counterclaim against the debt of the plaintiff." The defendant company admitted the execution of the note in suit, and that its said counterclaim was not in existence when this action was brought. The plaintiff admitted the facts alleged in the separate answer of the defendant company, but demurred *ore tenus* to the answer of said company on the ground that the said counterclaim was not in existence when this action was brought. The demurrer was sustained, and the defendant company appealed. We see no error in the ruling of the court below. As we have said in *Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288, the counterclaim, as it now exists, is the creature of the Code, being provided for in section 244, which is as follows: "The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." The counterclaim of the defendant company has no connection whatever with the plaintiff's original cause of action, and hence must come under the second class, which are available only when existing Deposits as Counterclaims—Equity. at the commencement of the action. We see no ground for equitable interference. The defendant company deposited money to its own credit with the plaintiff after the plaintiff had brought suit on a note in which the defendant company was the principal debtor. It may seem hard that the plaintiff should collect its own debt in full, and also keep the money of the defendant, but it is the defendant's own fault. It might have applied this money to the payment of

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its own debt; but, if it failed or refused to do so, it must abide the consequences of its own acts. It may be that it relied on the defense of its co-defendant, Wilson, and preferred to keep its money where it could be withdrawn in case of need. Whatever may have been the motive, it was a deposit, and not a payment, and, occurring after the bringing of the action, cannot be set up as a counterclaim. We see no error in this appeal. No error.

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v.

GRINSTEAD *et al.*

SAME *v.* HERNDON *et al.* SAME *v.* DRUEIN *et al.*

SAME *v.* OTTER *et al.* SAME *v.* SULLIVAN.

SAME *v.* WEDEKIND *et al.*

(*Court of Appeals of Kentucky, Oct. 4, 1899.*)

Crediting Drafts as Cash—Authority of Cashier.*—To decide whether or not a customer should be credited by the proceeds of a draft or check presented to the bank is within the apparent scope of the business of its cashier.

Same—Same—Ratification of Agent's Act—Effect on Subsequent Similar Acts.*—When the act of a bank cashier in crediting a customer by the proceeds of a draft presented to the bank was properly authorized and ratified, authority was thereby created in the cashier, by implication, to bind the bank by subsequent similar acts.

Same—Same—Repudiation of Agent's Act—Retaining Benefits.—A bank has no right to repudiate in part an act of its cashier and ratify it in part by retaining a portion of its proceeds.

Same—Agreement to Honor Checks—Rights of Check Holders.*—A bank agreed, through its cashier, to credit a customer by the amount of a draft drawn by him on consignees of produce, with a bill of lading attached; and that the customer should then draw checks on the bank against this cash credit for the purchase price of the produce in favor of its vendors. *Held*, that the bank could

*See notes at end of case.

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not refuse payment of such checks after it had received the draft, and credited the customer by its amount, pursuant to such agreement.

Same—Failure to Deduct Discount.—It was immaterial that such draft was credited for the full amount, and no discount deducted.

Same—Same—Same—Failure of Bank to Claim Its Rights under Bill of Lading.*—The bank had, by reason of the bill of lading, a first lien on the produce, which, for the protection of the check holders, no less than itself, it was its duty to enforce, and a loss resulting from its failure to do so fell on it, and did not affect the rights of the check holders.

APPEALS by defendant from Jefferson county circuit court, law and equity division. *Affirmed.*

Richards, Baskin & Ronald and W. M. Smith, for appellant.

HOBSON, J. The learned judge of the court below delivered the following opinion in these cases :

“D. H. Taylor, a man without capital, made an arrangement with the German National Bank, through its cashier, for him (Taylor) to buy and ship eggs to New York. Taylor was to draw a draft on the New York consignees, with a bill of lading covering the consignment of eggs attached thereto, and to turn it over to the bank ; and thereupon the bank would pass the amount of the draft thus secured by the bill of lading to the credit of Taylor on the books of the bank and on Taylor's bank pass book as so much cash. Taylor would then draw checks on the bank against this cash credit for the purchase price of the eggs in favor of the persons from whom he had purchased them. This was the principle upon which he had been carrying on his business with the Third National Bank prior to his transferring his business to the defendant, the German National Bank. It was, further, a part of the arrangement that the German National Bank would cash the checks which Taylor had previously drawn in favor of his vendors, when presented, and take to itself the proceeds of the drafts on the New

Case Stated.

*See notes at end of case.

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York customers which had been discounted at said bank. It is admitted that such was the arrangement in regard to the first draft of \$640, on January 8, 1896. The next day, January 9th, Taylor delivered to the bank another draft on New York, with bill of lading attached thereto, for the amount of \$1,139.40. This draft was discounted on that day, and the amount passed to his credit on the books of the bank and upon his pass book; and on the 13th of January another draft of similar character on New York consignees, with bill of lading attached, was discounted by Taylor at the said bank for \$1,780.48, and the same entries made on the bank book, putting the same to Taylor's credit, and also upon his pass book. The proof shows that these amounts were put to Taylor's credits, and that the bank not only paid all of Taylor's checks on the first draft of \$640, but also cashed several checks drawn by Taylor, in favor of his vendors from whom he had purchased the eggs, against the second draft deposited by him with the indorsed bill of lading attached thereto. After these drafts on New York, with the indorsed bills of lading attached thereto, had been discounted at the bank, and the amounts of the same passed to Taylor's credit on the bank books and in his pass book as so much cash, and after the bank had cashed Taylor's checks against the same in amount more than the amount of the first draft on New York, and after Taylor had given to the several plaintiffs in these six actions checks on the bank against his cash credit for the purchase price of the eggs shipped to New York and covered by the bills of lading held by the bank, and after the second draft on New York for \$1,139.40 had been dishonored, the president of the defendant bank—who, it seems, had not known of the arrangement between the cashier and Taylor, and who testifies that he did not know of the dishonor of the New York draft for \$1,139.40—directed the cashier to charge back on the books of the bank to Taylor's account the two drafts, one for \$1,139.40 and the other for \$1,782.48, and place the same on the books as drafts for collection. The cashier obeyed the orders of the president, and without the

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knowledge or authority of Taylor, or of any one authorized to represent him in that matter,—for from the evidence Druein certainly had no such authority,—charged the amount of these two drafts back to Taylor, who was at that time in the city of New York. The plaintiffs, to whom Taylor had given checks on the bank for the price of the eggs bought by him from them, presented their checks to the bank, and demanded payment thereof, and the same was refused. Hence these suits.

“The bank did not, when it charged back these amounts to Taylor’s account, offer to surrender the drafts on the New York consignees, or the bills of lading attached thereto, nor did it make such offer when it dishonored Taylor’s checks drawn in favor of these plaintiffs, nor has it ever offered to surrender the said drafts on New York and the bills of lading. On the contrary, the proof is that the president of the bank, with full knowledge of all the facts, held onto the New York drafts and bills of lading, and refused to surrender them to Taylor, and the same are in possession of the bank. The dishonor of Taylor’s draft on New York, it may be stated in passing, was caused by one of Taylor’s New York creditors attaching one of his consignments for an old debt due from Taylor to him. When the attachment in New York was levied on the eggs, the defendant bank, payee in Taylor’s draft against the New York consignee, and the holder and owner of the bill of lading accompanying said draft, had, in law and in equity, a superior legal interest and right in said eggs to any interest or lien which the New York creditors of Taylor could possibly acquire by any legal process, whether by attachment or otherwise. Taylor, the shipper, had indorsed the bill of lading to the bank, and attached the same to Taylor’s draft on the New York consignee in favor of the bank. This invested the bank with the legal and equitable title to the eggs consigned, against all claimants; yet the bank took no steps to resist the claim of the attaching creditor.

The first question of fact is whether there was such an

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agreement as above stated between Taylor and the cashier of the bank. It is sufficient to say that the affirmative of the proposition is established by a decided preponderance of the evidence.

"The second question is one of law. Did the cashier of the defendant bank have the right or power, as cashier, to enter into such an arrangement with Taylor, with authority of the president of the bank, who, it is conceded, had such power? It is admitted that the cashier was authorized to make, and that the president approved and knew of, the arrangement between Taylor and the bank with reference to the first draft of \$640. The law of agency is that authority from, or ratification by, a principal of an antecedent similar act or acts creates, by implication, authority in an agent to bind the principal by subsequent similar acts. Again, it is a doctrine of the law of agency that a principal cannot ratify

Same—Same—
Repudiation of
Agent's Act—Re-
taining Benefits.

in part and repudiate in part the unauthorized acts of an agent. In other words, the principal cannot play satyr, and approve of such part of the unauthorized act of the agent as is beneficial to him, and repudiate that part which is detrimental to his interest. If he knowingly receives and keeps any of the fruit of an unauthorized act of an agent, he thereby, in the law, ratifies and is bound by that part of the unauthorized act of the agent which is detrimental to his interests. The bank, by its president, with full knowledge of all the facts, kept the bills of lading which Taylor turned over to the bank under his arrangement with the cashier, which the bank says the cashier had no authority to enter into; so that, even if it be conceded that the cashier had no express authority from the bank or its president to pass the amount of the two discounted drafts with bills of lading attached to the credit of Taylor on the books of the bank, in order that he might draw against them in payment of the purchase price of the eggs, still, upon the proof, the bank, as principal, is bound by said cashier's acts on two grounds: (1) Of a prior similar act of its agent, which it authorized and ratified, which in law is an implied authority to its agent to

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bind it by subsequent similar acts, unless expressly forbidden by the principal. (2) By a subsequent implied ratification of the act or acts complained of by the bank receiving the benefit of the said alleged unauthorized acts, and retaining the beneficial fruits of the same, with full knowledge of all the facts and circumstances touching the discounting of the New York drafts, and crediting them as cash to Taylor's account on the books of the bank.

"It is immaterial, in the view which I take of the law and facts of this case, whether the president of the bank, at the time he directed the amount of the two discounted drafts to be charged back to Taylor's account, knew that the draft for \$1,139.40 had been dishonored in New York; nor is it material to the issue now before the court whether Mr. Carter, representing the bank, got possession of the eggs shipped on the 6th of January, and realized for the bank \$780.52. This circumstance confirms the liability of the bank rather than supports its defense. Mr. Carter returned the bill of lading covering the shipment of the 13th of January, together with Taylor's draft for \$1,782.48, to the bank, which, as we have seen, the bank received, held, and still holds, and refuses to surrender to Taylor. These acts of the bank and its president, together with others referred to above, constitute an implied ratification on the part of the bank of its cashier's acts, even if said cashier had no express authority so to do. Under the proof, I think there can be no doubt that the act of the bank discounting the drafts, and placing the amount to Taylor's credit, was in law equivalent to a cash deposit in the bank by Taylor subject to his checks. The bank did not receive the drafts for collection, but discounted them, and placed the amount as cash to the credit of Taylor; and certainly the bank felt it was safe in thus acting, for it had attached bills of lading covering the consignment of eggs against which the said drafts were drawn, and had a superior legal and equitable right to the said consignment to any claim or moral right,

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under the facts and circumstances, to charge back to Taylor's account the amount of the drafts which it had discounted and placed as cash to Taylor's credit."

The learned counsel for appellant asks a reversal of the judgment entered pursuant to the above opinion of the chancellor on the following grounds: (1) The cashier had no authority to make the arrangement made with Taylor, and it did not bind the bank. (2) Druein consented that the two drafts should be held by the bank for collection only, and the bank was under no obligation to pay any checks presented thereafter. (3) The proceeds of the drafts having never reached the bank, without its fault, it is not liable on the checks.

Crediting Drafts
as Cash—Author-
ity of Cashier.

Same—Same—
Ratification of
Agent's Act—
Effect on Subse-
quent Similar
Acts.

The evidence fully sustains the chancellor in his conclusions of fact. Whether or not a customer should be credited by the proceeds of a draft or check presented to the bank is necessarily within the apparent scope of the business of the cashier; and if there could be any doubt about this, as is well shown in the chancellor's opinion, appellant cannot rely on his want of authority, under the circumstances here shown.

The other two objections are equally untenable. On Saturday evening, January 11th, Taylor went to the bank, and told the cashier that he was then shipping his eggs, but could not get his bill of lading before the close of the bank that evening; that he had to go to New York that night, but before he left he would draw the draft, and attach to it the bill of lading; that Monday morning, at 9 o'clock, his friend Druein, who had introduced him to the cashier, would bring the draft, with the bill of lading and his pass book, to the bank, for the cashier to credit him by the draft; and that the cashier must be certain to do so, for he had given checks for the eggs to his customers, which he did not want protested. The cashier agreed to this. Druein brought the papers as Taylor had arranged, and the credit was given on

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Monday morning at 9 o'clock. After this, and before the checks sued on were presented, the president of the bank had the cashier send for Druein, and, after notice to him, changed the entry on the books, and entered, not only the draft that Druein had brought, but the last one discounted for Taylor, as received by the bank for collection. When this was done, it left Taylor overdrawn to the bank nearly \$800. Appellant then sent Mr. Allen R. Carter to New York to see what could be done about the eggs. He got possession of one car load, from which he realized about \$780. This amount was paid over by him to the bank, and substantially squared Taylor's account. The appellant, having got back the money it had paid out, took no steps to assert its right to the rest of the eggs, or to secure the payment of the other draft, although it had full notice of appellee's rights.

Druein clearly had no authority to make any change in the contract made by Taylor before leaving for New York, and it is equally clear that he did not undertake to do so. Taylor having expressly informed the bank that he would give checks to the parties from whom he bought the eggs to be paid out of the proceeds of the draft, and having obtained appellees' property upon the checks given pursuant to this arrangement, the bank cannot be permitted to repudiate the checks after the draft had been received by the bank pursuant to the arrangement, and Taylor's account credited by the amount of it. It is immaterial that the draft was credited for the full amount, and no discount deducted. The purpose of the arrangement was to secure Taylor as a customer, and enable him to buy and ship the eggs. His account having been credited by the draft, the outstanding checks were an appropriation of this credit. If the checks had been presented before the change was made in the entry to Taylor's credit, they would have been paid. The delay in the presentation of the checks, due to their passing through the clearing house, did not prejudice appel-

Same—
Agreement
to Honor Checks
—Rights of Check
Holders.

Same—Failure
to Deduct Dis-
count.

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lees' rights. The bank had, by reason of the bill of lading, a first lien on the eggs, and, if it had insisted on its rights, the proceeds of the other cars, not secured by Carter, would have paid the entire debt and protected all the parties from loss. This it was clearly the duty of appellant to do for the protection of the check holders, no less than itself, and, having failed to do so, the resulting loss should fall on it, and not on the appellees. Judgment affirmed.

Same—Same—
Same—Failure of
Bank to Claim Its
Rights under
Bill of Lading.

NOTES.

Powers of Cashiers of Incorporated Banks.—See *Valdetero v. Citizens' Bank of Jennings*, 1 Banking Cases, 601, and *notes*, 611 *et seq.*

Refusal to Honor Check—Liability of Bank to Holder.—See *notes*, 1 Banking Cases, 190 *et seq.*

Cashing Drafts Accompanied by Bills of Lading—Attaching Creditors—Title to Goods.—See *American Trust & Savings Bank v. Austin et al.*, 1 Banking Cases, 122, and *note*, 125.

WYMAN

v.

FT. DEARBORN NAT. BANK *et al.**(Supreme Court of Illinois, Oct. 16, 1899.)*

Debtor Bank as Depositor—Application of Deposit by Creditor Bank Holding Collateral Security—Presentment of Check—Subrogation of Check Holder.*—When the H. bank drew its check upon the D. bank for \$10,000 in favor of plaintiff, the D. bank had on deposit to the credit of the H. bank \$20,523.67, and the D. bank held a certificate of deposit from the H. bank, in the sum of \$25,000, secured by collateral for the face amount of \$30,000 of notes taken by the H. bank and indorsed to the D. bank, and the H. bank was indebted to the D. bank, on account, \$649.89. Three days thereafter the H. bank was placed in the hands of a receiver, and on the same day the D. bank transferred the account on deposit with it to itself, and cred-

*See generally extensive *note*, 1 Banking Cases, 190 *et seq.*

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ited its certificate of deposit with that amount, debiting the H. bank with such sum, and leaving a balance due itself of \$2,321.39, with interest thereon; and on the next day such check was presented to it for payment, which was refused; and plaintiff filed a bill, making the D. bank and the H. bank's receiver defendants, and sought to marshal assets. *Held*, that plaintiff was entitled to be subrogated, to the extent of such check, with interest thereon from the time it was presented, to the rights of the D. bank to the fund derived from the sale of such collateral securities, after the D. bank had paid itself in full from such fund.

APPEAL by plaintiff from First district appellate court. *Reversed*.

On September 1, 1896, the First National Bank of Helena, Mont., drew its check upon the Ft. Dearborn National Bank of Chicago for \$10,000, in favor of appellant. At the time this check was given, the Ft. Dearborn National Bank had in its possession, on deposit to the credit of the First National Bank of Helena, \$20,523.67. The Ft. Dearborn National Bank at the same time held a certificate of deposit of date May 15, 1895, from the First National Bank of Helena, in the sum of \$25,000, which latter was secured by collateral for the face amount of \$30,000 of notes taken by the First National Bank of Helena and indorsed to the Ft. Dearborn National Bank. The Helena bank was indebted to the Ft. Dearborn National Bank, on account, \$649.89. On the 4th day of September, 1896, the Helena bank was placed in the hands of a receiver, and on the same day the Ft. Dearborn National Bank transferred the account on deposit with it to the amount of \$20,523.67 to itself, and credited its certificate of deposit with that amount, debiting the Helena bank with the same sum, and leaving a balance due the Ft. Dearborn National Bank of \$2,321.39, with interest thereon. On the 5th day of September the check drawn in favor of appellant was presented for payment to the Ft. Dearborn National Bank, which was refused. On the 21st day of January, 1897, the appellant filed in the superior court of Cook county his bill, making the Ft. Dearborn National Bank and the receiver of the

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Helena bank defendants, and sought to marshal assets. To this bill of complaint a demurrer was interposed and overruled. Subsequently the defendants to the bill filed an answer, and the cause was submitted upon bill and answer, and a decree was entered in accordance with the prayer of the bill, to reverse which the defendants sued out a writ of error to the appellate court for the First district, where the decree was reversed, and the cause remanded, with directions to dismiss the bill, whereupon the appellee in the appellate court prosecuted this appeal.

Peckham, Brown & Packard, for appellant.

PHILLIPS, J. (after stating the facts). It is insisted by the appellant that by the execution and delivery of its check for \$10,000 against the deposit account of the Ft. Dearborn National Bank the First National Bank of Helena assigned and transferred to the appellant, from that deposit account, an amount sufficient to pay the check on September 1, 1896, the time at which it was drawn; and as sustaining this contention appellant cites *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Abt v. Bank*, 159 Ill. 467, 42 N. E. 856; and *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 49 N. E. 420. The principle is clearly established by the foregoing and other authorities in this state that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented. *Munn v. Burch*, 25 Ill. 21. The check operates as an absolute assignment of the fund on which it is drawn from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such

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presentation is absolutely assigned to the holder of the check. *Bickford v. Bank*, 42 Ill. 238; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Bank v. Jones*, 137 Ill. 634, 27 N. E. 533; *Niblack v. Bank*, 169 Ill. 517, 48 N. E. 438. And the relation existing between the drawer, the check holder, and the banker becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that, because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the banker, and the check holder is that the check holder, whoever he may be, may have his action, and recover against the bank the amount, *pro tanto*, of the check. *Gage Hotel Co. v. Union Nat. Bank*, *supra*. In the latter case it was said (page 536, 171 Ill., and page 422, 49 N. E.): "If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the check holder until presentment, and that priority in drawing a check does not give priority of right to the fund as against the banker, but that such priority of right is determined by the order of presentation." It was held in *Niblack v. Bank*, *supra* (page 521, 169 Ill., and page 439, 48 N. E.): "It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account; and, if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterwards presented." In this case, on the 4th of September—at least one day before the presentment of the check for payment—the Chicago bank transferred the account, and by proper entries on its books credited the Helena bank with all the money held by it to the credit of the latter bank, which credit was made on a certificate of deposit, which was, in

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effect, a demand note. *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494. Appropriating the deposit fund in good faith, in pursuance of strict legal rights, for the purpose of protecting its own interests, and without notice of the appropriation of the money by drawing the check in favor of appellant, was not a wrongful act, but one authorized by law, and absolutely transferred the legal and equitable right to the fund so deposited to the Ft. Dearborn National Bank, the check not having been presented to it, nor it having any notice of the same, until the day after the transfer of the account. Under the recognized rule in this state there was between the Helena bank and the payee of the check an absolute assignment of \$10,000, then on deposit with the Ft. Dearborn National Bank, and no right existed in the Helena bank to change that deposit in any way, or to so draw against it as to prevent the assignment *pro tanto* from being carried out. It is clear that the holder of the check had an interest in the fund so assigned, while it is equally clear that until the bank had notice it could pay subsequently drawn checks, or credit the amount of the deposit on any overdue paper of its own. The equitable interest of the check holder, however, remained the same.

It is a principle controlling the marshaling of securities that where one creditor can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. In *Pom. Eq. Jur.* § 1414, it is said: "If, therefore, the prior creditor resorts to the doubly-charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, * * * that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor." Numerous authorities are there cited as sustaining these propositions. The principle of marshaling securities has been frequently applied to cases where there is an equitable

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interest or lien on collateral securities. In *Colebrooke on Collateral Securities* it is said (section 98): "By this rule, a creditor having a lien upon two funds for the payment of his debt, and a subsequent creditor a lien upon one only of such funds, the former is required to exhaust his remedy against the fund which is especially for his security before resorting to that in which the subsequent creditor is interested. The rule, however, is never enforced in cases where it would cause an injury or damage to the creditor holding such liens upon separate funds, or would work injustice to other parties. The rule was applied where a merchant had forwarded his note to a broker for sale, and the proceeds, less commissions, remitted. The broker fraudulently pledged the note, with other collaterals, to a bank, to secure a loan to himself, of which the merchant received nothing. The merchant learning of the misappropriation, gave notice to the bank, and claimed to be subrogated to any surplus arising from other securities held by it after the payment of the loan. Subsequently, and before the maturity of the loan, the note fell due, and was paid without suit. Upon realizing the other securities, the bank held a surplus in its hands. The merchant was entitled to be paid from such surplus, his voluntary payment not affecting his right of recovery." This principle is sustained by *Farwell v. Bank*, 90 N. Y. 483. In that case the merchant had an equitable interest in collaterals, which, with his note, were put up to secure the loan to the broker by reason of the broker's misappropriation of the note, and it is not, equitably, a stronger case for the marshaling of assets than where, as in this case, the bank had as security for its certificate of deposit and for its account due notes aggregating about \$30,000, and a deposit of over \$20,000. Here, \$10,000 of the amount deposited having been equitably assigned to the complainant, by reason of its appropriation by the bank before receiving notice of the drawing of the check the complainant was deprived of all interest in the deposit, and the Helena bank, or its receiver (who could have no greater interest than the bank itself), received

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the benefit of the application of the deposit by the Ft. Dearborn National Bank on its certificate of deposit, and the complainant, as holder of the check, had such an interest in the sum deposited that he should be subrogated, as against the Helena bank or its receiver, to the notes held by the Ft. Dearborn National Bank after the payment of the residue due the latter bank; and this principle of subrogation is applicable because, by reason of the appropriation of the fund by the bank with which the deposit was made to the payment of a debt for which it held two distinct characters of securities, one of those securities is, to an extent sufficient to pay the complainant, released from liability so far as the Ft. Dearborn National Bank was concerned, and the latter bank had lawfully used \$10,000 of a deposit theretofore assigned to the complainant by the Helena bank. 2 Beach, Mod. Eq. Jur. § 784; 1 Story, Eq. Jur. §§ 635, 636.

It is a maxim of equity that "equity regards and treats that as done which in good conscience ought to be done," and in writing of this maxim Mr. Pomeroy, in his work on Equity Jurisprudence (section 365), says: "The principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties; a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty—the 'ought'—resting upon the latter to do such act. Equity does not regard and treat as done what might be done or what could be done, but only what ought to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved." A court of equity, acting upon this fundamental principle, may go beneath the appearance of things, and deal with the real facts, where the interest is a purely equitable one, recognized by courts of equity alone. When, therefore, a prior incumbrancer of two funds, by his election of remedies,

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deprives a junior incumbrancer, who has a lien upon one of the funds only, from reaching the particular fund on which he has a lien, the junior incumbrancer, to the extent of his lien, should be substituted to the lien of the paramount incumbrancer upon the other fund bound, as against the debtor and all claiming under him by lien or titles subsequent in time. *Gibson v. Seagrim*, 20 Beav. 614; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235. Under a bill for marshaling securities relief may be had in that character of case. The Ft. Dearborn National Bank had a right to apply the deposit in payment of the indebtedness *pro tanto* to the extent of the deposit, and deprive the check holder of any part of that deposit as a fund assigned to him; but he had such an equitable interest in that fund, by reason of its assignment by the check, that he is entitled to be subrogated to the extent of his check, with interest thereon from the time it was presented, to the fund to be derived from the collection or sale of the collateral securities held by the Ft. Dearborn National Bank as security on its certificate of deposit and bank account, after the residue is paid to it. The superior court erred in decreeing that the Ft. Dearborn National Bank should deliver to the receiver of the First National Bank of Helena the collateral notes, but did not err in decreeing that from the proceeds of the same there should first be paid to the Ft. Dearborn National Bank the amount, including interest, due it, and to pay to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of the First National Bank of Helena. Nor was there error in the decree of the superior court in directing, if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank of Helena, to be paid in due course of administration of its assets, and that the receiver pay the costs. It was error in the appellate court for the first district to reverse the entire decree of the superior court, and remand the cause with directions to dismiss the bill.

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So far as the superior court decreed that the Ft. Dearborn National Bank deliver to the receiver of the First National Bank of Helena the collateral notes, its decree is reversed, but in all other respects the decree of said court is affirmed. For the error of the appellate court for the First district in reversing the entire case, and remanding with directions to dismiss the bill, its decree is reversed, and the cause is remanded. Reversed and remanded.

SLACK

v.

NORTHWESTERN NAT. BANK OF SUPERIOR.

(Supreme Court of Wisconsin, April 25, 1899.)

Banking Corporations—Insolvency—Preference of De Facto Officers.—Where a savings bank, although it has officers of its own, is exclusively managed by the officers of a national bank to which it is indebted, a transfer of collaterals and money from the savings bank to the national bank, when the former is insolvent and on the verge of suspension, is an illegal preference of the *de facto* officers of a corporation.

Bank's Right to Off-Set Deposit.*—General deposits received by a bank in the regular course of business simply constitute an indebtedness from the bank to the depositor, and, upon the insolvency of the depositor, the bank may off-set it against a sum owing to it by the depositor; and this right is not affected by the fact that the officers of the bank also endeavor to illegally prefer themselves as the *de facto* officers of the depositor by having a check drawn in favor of the bank for the amount of the deposit.

APPEAL by defendant from Douglas county superior court. *Affirmed in part.*

This is an action by the receiver of the State Trust & Savings Bank, an insolvent state banking corporation,

*See *Columbia Nat. Bank v. German Nat. Bank*, 1 Banking Cases, 43, and *notes*, 47 *et seq.*

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against the defendant, a national banking corporation, to recover a considerable amount of notes, bonds, and other securities, as well as over \$9,000 in money, on the ground that the same were fraudulently taken by the officers of the defendant bank from the assets of the State Trust & Savings Bank at a time when the latter institution was insolvent. The action was tried by the court, and the findings of fact are quite lengthy, and may be summarized as follows: That on and prior to February 13, 1897, the State Trust & Savings Bank was a state banking corporation, and the defendant a national banking corporation, both doing business at Superior, the former corporation doing its business in the same bank building and room with the defendant; that the custom of the State Trust & Savings Bank was to deposit its funds, with the exception of \$1,000, at the end of each day's business, with the defendant bank, reserving only said \$1,000, which it deposited in its own safety-deposit vault; that when the Savings Bank needed funds in its business it obtained the same by drawing checks on the defendant bank, and that when its deposits were exhausted, and it needed additional funds, it borrowed the same from the defendant bank, and gave certificates of deposit therefor; that in February, 1896, one Landswick was elected cashier of the Savings Bank, and remained such until the appointment of the receiver; that until the evening of February 11, 1897, Homer T. Fowler was a director and president of the defendant bank, and was general manager thereof, and until February 12, 1897, was also a director and general manager of the Savings Bank, and said Landswick conducted said Savings Bank according to the directions given him by Fowler; that the board of directors of the Savings Bank was composed of Landswick, Homer T. Fowler, and Walter Fowler, but that said bank had no president for some time prior to February 13, 1897; that one Julsrud, cashier of the defendant bank, at times gave directions to Landswick, as to the business of the Savings Bank, for Mr. Fowler; that Louis Hanitch was attorney for

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both banks, and was in the banking room nearly every day on business as attorney or otherwise; that there were continuous withdrawals from the Savings Bank beginning in 1893, and that for two weeks or more prior to February 12, 1897, heavy withdrawals were made from both banks; that on the evening of February 11, 1897, Homer T. Fowler resigned as president of the defendant bank, and ceased to manage its business, but continued to be a director until February 16th following, and that on said February 11th Julsrud resigned as cashier, and one Kommers was elected cashier, but that Julsrud continued to act during the whole of the 12th day of February; that Landswick was informed of these resignations by Mr. Fowler on the same evening that they took place, and that Fowler then told Landswick that he would have nothing more to do with the Savings Bank, and that he (Landswick) should take his orders from the new officers of the defendant bank; that Hanitch succeeded Homer T. Fowler as president and manager of the defendant bank, and actively engaged in such management on the 12th of February; that the banking hours of said banks were from 10 o'clock a. m. to 3 o'clock p. m., but that the Savings Bank frequently did business with the defendant bank after 3 o'clock; that on the morning of February 12, 1897, the Savings Bank was indebted to the defendant bank in a sum exceeding \$30,000, and that the Savings Bank was then insolvent, which insolvency was known to the defendant bank; that on the morning of said day the Savings Bank had on hand \$800 in cash, and during the day drew \$2,000 by check from the defendant bank for the running of its business; that between 11 o'clock and 12 o'clock Landswick paid a certificate of deposit of \$5,175 due on that day from the Savings Bank to the defendant bank by check on its funds in the defendant bank, which refused to extend the time of payment of said certificate of deposit; that, after banking hours on the 12th of February, the Savings Bank had about \$1,000 in cash on hand, which Julsrud requested him to deposit with the defendant bank, and he did so, making the balance

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which the Savings Bank then had on deposit in the defendant bank \$4,744.29; that there was then owned by the defendant bank a past due note of \$5,000 on which the Savings Bank was liable as indorser, and that Julsrud, by direction of Hanitch, requested Landswick for a check for the amount of the deposit balance to apply on this note, and upon Landswick's objecting to this, Julsrud told him they would charge it up on the note, and Landswick then gave a check for said sum of \$4,744.29 which was all the cash which said Savings Bank had, except about \$200 in change; that Hanitch afterwards sent Julsrud to Landswick to get additional collaterals and securities for the indebtedness owing by the Savings Bank to the defendant bank, and that Julsrud told Mr. Landswick of the order and request of Hanitch, and told him that he understood that the Savings Bank was going to be closed up in the morning, and thereupon Landswick allowed Julsrud to take the envelope containing the collaterals and assets of the Savings Bank, and that Julsrud looked them over and selected a large number of notes, bonds, and collateral securities, being the same involved in this action, and gave a receipt therefor, as collateral security to the indebtedness of the Savings Bank to the defendant bank; that at the time of this transaction the Savings Bank was, and still is, indebted to the defendant bank to an amount exceeding the value of said securities, and that the defendant bank claims to hold said securities as collateral security therefor, and for no other purpose, and that after the delivery of said securities the Savings Bank still had assets of the face value of more than \$20,000; that Landswick paid no attention to the transaction, and did not know what papers were taken by Julsrud; that these transactions all took place about 5 o'clock in the afternoon, and that about 8 o'clock in the evening Hanitch stated to the plaintiff that the Savings Bank was going to be put in the hands of a receiver, and that upon the following morning action was commenced by the defendant bank, Mr. Hanitch being one of the attorneys, against the Savings Bank, to wind up its affairs, and an

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answer was put in by the Savings Bank, confessing the allegations of the complaint, which Landswick signed and verified at the request of the plaintiff's attorneys, and upon the same day the plaintiff in this action was duly appointed receiver of the Savings Bank, and was duly authorized to prosecute this action; that the assets of the Savings Bank, including those so taken, will not pay 50 cents on the dollar of its liabilities, other than the claims of the defendant bank; that demand for the return of said funds and property was duly made by the receiver before the commencement of this action; that at the time of turning over of the collaterals and the \$300 in cash Landswick knew that the Savings Bank could not continue business, and the officers of the defendant bank had determined to close up the Savings Bank and have a receiver appointed on the following day, and that they took said money and collaterals in contemplation of such action; that said money and collaterals were obtained from Landswick by reason of the intimate relations of said banks and on account of the control the officers of said defendant bank had over the officers and affairs of the Savings Bank, and that the said acts were in fraud of other creditors of the Savings Bank, and that the reason Landswick allowed such transfers to be made was that he always acted under the direction of the officers of the defendant bank, and understood it to be his duty so to do. Upon these facts, the court concluded that the defendant should surrender up all of said securities, and pay to the plaintiff the said sum of \$1,744.29, with interest from February 12, 1897, and entered judgment in accordance with these conclusions, from which the defendant appeals.

Ross, Dwyer & Hanitch, for appellant.

Titus & McIntosh, for respondent.

WINSLOW, J. (after stating the facts). We regard the findings of fact as amply supported by the evidence, and shall therefore simply discuss the legal questions arising upon the facts found. The court has had occasion in several

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recent cases to discuss the question of the rights of creditors to proceed by ordinary processes of law against an insolvent corporation to collect their demands, and it may now be said to be well settled that such right exists as fully as though the debtor were an individual, instead of a corporation. *Ballin v. Bank*, 89 Wis. 278, 61 N. W. 1118; *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115; *Hinz v. Van Dusen*, 95 Wis. 503, 70 N. W. 657. Thus far, at least, the so-called "trust-fund doctrine" has been distinctly repudiated in this state; but the question whether the creditor could obtain payment of his debt from an insolvent corporation by voluntary transfer to him of property of the corporation without fraud has not been definitely decided. It is true it was said by the late MR. JUSTICE NEWMAN, in *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885, "It certainly is not going much further to hold that, so long as the corporation is a going concern, it may in good faith use the corporate property to pay or secure its *bona fide* debts"; but the question did not arise in that case, and hence the remark cannot be considered as authoritative. Certainly, however, it would seem strange if a creditor could not obtain by fair voluntary agreement and transfer that which he could obtain by an adversary proceeding at law. No good reason occurs to us now upon which such an arbitrary distinction can logically rest, and we think the distinction is also in opposition to the clear weight of the later authorities upon the subject.

It was said by the supreme court of the United States, in *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, "That doctrine [the trust-fund doctrine] only means that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence." And in *Hollins v. Iron Co.*, 150 U. S. 371,

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14 Sup. Ct. 127, it was further said: "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." To the same effect are *Hospes v. Car Co.*, 48 Minn. 174, 50 N. W. 1117; *White v. Pettes*, 30 Fed. 864; 2 Mor. Priv. Corp. § 786; *Pondville Co. v. Clark*, 25 Conn. 97. We fully agree with the principles thus laid down, and were the relations of the two banks in the present case simply those of debtor and creditor we should have no difficulty in holding that the transfer of collaterals made on the evening of February 12th was a valid transfer; there being no actual fraud found. But in this case another fact presents itself, which must be considered in view of a well-settled legal principle now to be stated. It has been held by this court in a number of cases that when a corporation is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, then such officers are so far trustees that they may not transfer corporate property to themselves in payment of debts due them, and that such a transfer constitutes a fraud in law. *Hinz v. Van Dusen*, 95 Wis. 503, 70 N. W. 657. In the present case it appears that there was no president of the Savings Bank, and that the directors were merely such in name, and that the Savings Bank was a mere offshoot of the defendant bank; and, while having nominally a separate corporate existence, its affairs were exclusively managed by the officers of the defendant bank. The cashier of the Savings Bank was in fact

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but a subordinate of the defendant bank, and simply did the bidding of its officers. The defendant bank therefore was in the same position in fact as the legally elected directors of the Savings Bank would have been had they performed their duties. To say that legally elected officers cannot prefer themselves, but that persons who are in fact acting as officers and managing the business can prefer themselves, would seem an anomaly in the law. Such a holding sacrifices substance to form, and would open an easy way by which the assets of an insolvent corporation could be divided up among persons who were officers *de facto*, but not *de jure*. The law is guilty of no such absurdity. In this case the defendant, through its officers, was in fact managing the affairs of the Savings Bank. It could no more prefer itself out of the assets of the Savings Bank when it was insolvent, and was on the verge of suspension, than could legally elected directors, and for the same reasons. This seems to us good sense and good law, and it does not infringe upon the doctrine that a mere creditor of an insolvent corporation may by voluntary transfer, in good faith, receive and hold property of the corporation in payment of his debt or as collateral thereto.

This conclusion renders necessary an affirmance of the judgment so far as the collaterals and the \$800 in money are concerned, which were transferred to the defendant on the evening of February 12, 1897. We can see no reason, however, for holding that the remainder of the deposits, amounting to \$3,944.29, should be recovered by the receiver. These deposits had been made apparently in the regular course of business at previous times, and simply constituted an indebtedness which the defendant bank owed to the Savings Bank, and which it had the right to off-set against a part of the much larger indebtedness owing to it by the Savings Bank. *Johnston v. Humphrey*, 91 Wis. 76, 64 N. W. 317. The fact that a check was given by Landswick on the even-

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ing of February 12th would not destroy this right. That part of the judgment providing for a recovery of \$3,944.29 and interest is reversed, and in all other respects the judgment is affirmed. No costs are allowed either party, but the respondent will pay the fees of the clerk of this court.

BARDEEN, J., took no part.

MYERS

v.

SOUTHWESTERN NAT. BANK.

(*Supreme Court of Pennsylvania, Oct. 6, 1899.*)

Payment on Checks Forged by Confidential Clerk—Negligence of Depositor.*—In an action to recover a sum deposited with the defendant bank, and alleged to have been paid out by it on forged checks, it appeared from plaintiff's evidence that during a period of over two years plaintiff's confidential clerk and bookkeeper who was specially intrusted with the business of attending to his bank account, making deposits with defendant, etc., forged checks to the amount of the claim, which were paid by defendant, and charged to plaintiff in his bank book; that such bank book was balanced 12 times during such period, and the first settlement included two of the forged checks; and that it would have appeared, upon proper examination by plaintiff, that the bank had charged him with the payment of the first two forged checks, for which no vouchers appeared among the checks handed to him by his clerk, they having been abstracted and destroyed by the latter. *Held*, that plaintiff's failure to object within a reasonable time to the payment of the forged checks included in the first settlement gave the bank a right, in afterwards honoring checks signed by the same person, to assume that their signatures had been at least tacitly recognized by plaintiff as genuine; and that a verdict was properly directed for defendant.

APPEAL by plaintiff from Philadelphia county court of common pleas. *Affirmed.*

Alex. Simpson, Jr., and Francis Shunk Brown, for appellant.
Frank P. Prichard and John G. Johnson, for appellee.

*See notes at end of case.

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STERRETT, C. J. The only testimony introduced on the trial of this case was that of the plaintiff himself and his witnesses; none was offered by the defendant bank. When plaintiff closed his case, the learned trial judge instructed the jury "to find a verdict for the defendant," which was accordingly done, and judgment was afterwards entered on the verdict. The binding instruction under which the jury acted constitutes the only specification of error. The averments of fact on which the plaintiff's claim was based are fully set forth in his statement, and need not be recited here at length. This suit was brought to recover \$13,090 deposited by him in the defendant bank, and paid out by it, as he alleged, on unskillfully executed forgeries of checks, made by his confidential clerk and bookkeeper, without a careful examination, by the proper bank officers, of the signatures thereto, because of their acquaintance with, and confidence in, the forger. He further substantially alleged that said forged checks were abstracted and destroyed by said clerk, who also falsified his (plaintiff's) books and accounts so as to make the apparent balances in the check book and deposit book correspond, and that said falsification was so skillfully done as to deceive not only the plaintiff, but also expert accountants employed by him to examine his books, checks, and accounts. He further averred that, as soon as the fraud was discovered, the forger was arrested, convicted, and sentenced, and the defendant bank was forthwith notified of the loss; but it declined to pay any part thereof.

It was shown on the trial that in March, 1891, the defendant bank opened an account with the plaintiff as a depositor in the usual form, and from that time, for the period of over two years and a half, his deposits, made in the ordinary way, aggregated over \$622,000. During all that time, as well as before, plaintiff had in his employ said confidential clerk and bookkeeper, to whom he specially intrusted the business of attending to his bank accounts. That duty included making deposits, occasionally handing in the bank book to be written up and balanced, and, when that was done, the fur-

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ther duty of receiving the canceled checks, etc., with the payment of which the bank had credited itself, and delivering the same to the plaintiff for examination, approval, etc. In the same connection, it was the duty of the clerk to verify the bank book, as the same was written up and balanced, from time to time, by the bank, and report the result to the plaintiff. This he professed to do, but, in fact, he falsely reported that the balance, etc., was correct. From March, 1891, to November, 1893, the clerk forged checks to the amount of the claim in this case, which were paid by the bank and charged to plaintiff in his bank book. For the purpose of concealing these forgeries, he falsified his employer's books, and, by misadditions and missubtractions, forced the balances in the check book so as to make them agree with those in the bank book. During the period above mentioned, plaintiff's bank book was balanced 12 times. The first settlement included two forged checks,—one \$300 and the other \$200. The last settlement included a \$350 forged check. The other forgeries were respectively included in the intermediate settlements. At each settlement the amount of each check, not previously settled and canceled, was entered on plaintiff's bank book, by the bank, as a charge against him, and the book, together with the checks, was delivered to his clerk for the purpose of examination and verification. If, at the time of each settlement, the forged checks had been examined by the plaintiff, or if the number and the aggregate amount of the checks had been compared with the number and amounts of the checks separately entered in the bank book, or if the checks had been compared with the stubs of the check book, or if the additions of the deposits and checks on the check book had been examined, the forgery would have been discovered. Neither of these was done, for the reason that plaintiff's unfaithful clerk, who was deputed by him to receive the checks, etc., from the bank, take them to the office, and compare the amounts, etc., with the bank book, abstracted and destroyed the forged checks, and failed to call his employer's attention to

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the discrepancies, which undoubtedly would have resulted from a proper comparison and examination. He did this because he himself was the forger. The result was that, for more than two years and a half after the first forged checks were paid, no complaint was made and no notice of any error in the settlements was given to the bank. It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged plaintiff, on his bank book, with the payment of two items (\$300 and \$200) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers—the two forged checks—had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him. His silence was tantamount to a declaration to that effect; and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine. While the plaintiff was not chargeable with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, *viz.* to receive the checks from the bank, take them to his employer's office, and compare the amounts thereof with the amounts in the bank book and check book, etc.

In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that, as between the bank and the plaintiff, the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question and approve or reject them within a reasonable time. In contemplation of law, the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were

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claimed. The bank was therefore entitled to have them examined, and, if rejected, returned within a reasonable time. That was not done, and, because of plaintiff's failure to perform his duty in that regard, he should not be permitted to recover. Any other rule would be inconsistent not only with general and long-established custom, but also with well-settled principles of law on the subject. *Bank v. Morgan*, 117 U. S. 96, 107, 6 Sup. Ct. 657; *United Security Life Insurance & Trust Co. v. Central Nat. Bank*, 185 Pa. St. 586, 40 Atl. 97. We find no evidence that required submission of the case to the jury. There was no conflict of testimony as to the failure of the plaintiff to perform the duty which, under the undisputed evidence, he owed to the defendant; nor was there any evidence of negligence, on the part of the bank, that should have been submitted to the jury. The checks purporting to be signed by the plaintiff were destroyed, and, of course, they were not produced. There was not a particle of evidence that the signatures were not such complete fac similes of plaintiff's signature as to be impossible of detection, even by an expert. As correctly stated by counsel, on a question put by plaintiff's counsel, he stated that he was not an expert penman, and that he had never before had any experience in forging other people's names; but he was not asked, and did not say, that the signatures were not made, either by the use of tracing paper or otherwise, so like the originals that they could not be detected by an ordinary inspection. On this point, negligence is not to be presumed, and hence the presumption must be in favor of the bank. In the absence of any evidence, from the signatures themselves, or from witnesses, that there was any difference, between them and plaintiff's signature, which could be detected by the eye, it must be assumed that the forgery was of such a character that the bank, acting with due care and caution, was deceived by it. In fact, there was no evidence from which the jury would have been warranted in drawing the conclusion that the bank, in honoring checks, acted negligently.

Notes

After a careful consideration of the evidence, our conclusion is that there was no question of fact that should have been submitted to the jury, and hence there was no error in directing them to find for the defendant. The judgment is therefore affirmed.

NOTES.

Forgery by Confidential Clerk of Depositor—Bank's Liability.—In *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, the court held that "A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent and with due diligence, to examine the pass-book and vouchers, and report to the bank without unreasonable delay any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterward dispute the correctness of the balance shown by the pass-book."

And in *First National Bank of Birmingham v. Allen*, 100 Ala. 476, 46 Am. St. Rep. 80, the court said: "Does the evidence show such omission of duty on the part of the plaintiff as to make him liable, and did loss result proximately to the defendant from such omission? The evidence shows that, on each occasion after the return of the pass-book and checks, the plaintiff, with the assistance of his clerk Tomlin, the forger, examined the account as rendered, and the checks, or vouchers. We may conclude the evidence shows that the plaintiff himself personally was without fault in this respect, and, but for the fact that his clerk Tomlin was the forger, the false checks would have been discovered by the examinations which were in fact made. The evidence shows that in these examinations Tomlin either called from the pass-book, and the plaintiff the checks, or *vice versa*, and Tomlin, knowing when a forged entry or check was reached, answered in such a way as to deceive the plaintiff. Tomlin the clerk and forger had knowledge of the forged checks. Was such knowledge of the agent chargeable to his principal?

The case of *Dana v. National Bank*, 132 Mass. 156, holds that the principal is chargeable with notice under such circumstances, and we are of opinion the conclusion is supported by reason and sound principles of law.

It is clear that in forging the checks Tomlin did not act within the scope of his authority, but upon what principle can it be said that in the matter of examining the pass-book and vouchers he was not

Notes

acting within the scope of his authority? He was appointed and directed by the plaintiff to do this very thing. If Tomlin had not been the forger, and in no manner interested in concealing the forgeries, and, in making the examination of the pass-book and vouchers, had discovered that numbers of the checks were forgeries committed by other persons, would not such knowledge on his part be chargeable to the principal? The law is, that the principal is chargeable with the knowledge of such facts as the agent acquired acting within the scope of his business. Is the rule to be changed because of the dishonesty of the agent? His dishonesty cannot change his relationship to his principal, to the detriment of third parties. If the duty would have been within the scope of an honest clerk it is none the less within the scope of duty of a dishonest clerk. We have held that it was the duty of the depositor, by himself or an authorized agent, to examine the account, and vouchers or checks. If the agent employed by him to perform this duty is culpably negligent, is not the principal to be held liable for such want of due care on the part of the agent? Or if the agent, in making such examination, detects palpable forgeries, is not the principal chargeable with the knowledge of his agent? It can make no difference that the agent himself was the forger, and did not act within the scope of his authority in perpetrating the forgery. He was acting within the scope of his employment in the examination of the vouchers, and it then became his duty to his employer to make known the forgery, as much so as if the forgeries had been perpetrated by some other person, which were discovered by him in the examination made. Our opinion is that under the circumstances the plaintiff was chargeable with the facts within the knowledge of his agent and clerk at the time of the examination of the pass-book and vouchers, and which should have been communicated to the principal or the bank. Certainly the bank should not suffer because of the fact that plaintiff's dishonest clerk prevented the plaintiff from doing his duty to the bank: *Dana v. National Bank*, 132 Mass. 156.

Compare, however, *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, where the court denied that the knowledge of the clerk forging such checks could be imputed to his master, citing *Manhattan Co. v. Lydig*, 4 Johns. 377; *Weisser v. Denison*, 10 N. Y. 68.

In *Welsh v. German Nat. Bank*, 73 N. Y. 424, 29 Am. Rep. 175, it was held that a depositor could recover from a bank money paid out on his checks, such checks having been fraudulently endorsed in payee's name by the depositor's confidential clerk who secured them by fraud, and who also had charge of the duty of examining the depositor's bank account and vouchers.

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MECHANICS' NAT. BANK OF TRENTON

v.

HARTER *et al.*

(*Court of Errors and Appeals of New Jersey, Nov. 20, 1899.*)

Effect of Payment on Forged Check.*—The implied contract on the part of a bank with its depositor is that it will disburse the money standing to his credit only on his order, and in conformity with his directions; and therefore if it makes a payment on a check to which his name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor, unless it shows a right to do so on the doctrine of estoppel, or because of some negligence chargeable to the depositor.

Care Required of Depositor.—The return, to a depositor, of his check with a forged indorsement, together with his balanced pass book, casts on him only the duty of exercising reasonable care and diligence to examine the vouchers and the account as stated by the bank, and to inform the bank of any errors thus discoverable.

Payment on Forged Check—Bank's Right of Action against Depositor.—A. delivered to the plaintiffs a sum of money, to be paid to B. The plaintiffs gave to C. for B. their check on the defendant bank, in which they were depositors, for the amount, payable to the order of B. C. forged B.'s name on the back of the check, and thus obtained the money from the bank. *Held*, in an action by the plaintiffs to recover from the bank the balance of their deposits, that the bank would not be entitled to charge the check against the plaintiffs on showing that A. had lost his right of action against the plaintiffs for the money which he had delivered to them.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Affirmed.*

William M. Lanning, for plaintiff in error.

Frank S. Katzenback, for defendants in error.

*See *Rice et al. v. Citizens' Nat. Bank*, 1 Banking Cases 512, and *note*, 515.

Mechanics' Nat. Bank of Trenton v. Harter

DIXON, J. The facts constituting the plaintiffs' side of this case were as follows : On January 29, 1898, Samuel J. Kelly gave them his check for \$1,000, and directed them to pay the

Case Stated. amount to Kate Young on delivery of her bond and mortgage to Howard M. Richards. On the

same day a bond and mortgage purporting to be made by Miss Young to Richards were delivered to the plaintiffs by Le Roy Applegate, a lawyer in whose office Miss Young was employed as a stenographer; and thereupon the plaintiffs gave to Applegate their check on the defendant bank, in which they were depositors, for \$985, payable to the order of Miss Young. Applegate had forged Miss Young's signature on the bond and mortgage, and he also forged her signature on the back of the check, making it payable to his own order; and, he having added his own indorsement, the bank paid it to him. On February 11, 1898, the bank balanced the plaintiff's pass book, and returned to them this check as one of the vouchers; but the plaintiffs, not being acquainted with Miss Young or her signature, did not then discover the forgery, nor were they informed of it until November, 1898, when they promptly notified the bank. Having then demanded from the bank the amount of the check, they brought this suit to recover it. There can be no doubt that on these

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on Forged Check.

circumstances, standing alone, the plaintiffs were entitled to the verdict which was ordered in their favor at the trial in the Mercer circuit. The relation between a bank and its depositor is that of debtor and creditor, and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order, and in conformity with his directions. When, therefore, it makes a payment upon a check to which the depositor's name has been forged, or upon his genuine check to which the name of a necessary indorser has been forged, it must be held to have paid out of its own funds, and cannot charge the amount against the depositor, unless it shows a right to do so on the doctrine of estoppel, or because of some negligence chargeable to the depositor. 5 Am. &

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Eng. Enc. Law (2d Ed.) 1066 *et seq.*; Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371; United Security Life Insurance & Trust Co. *v.* Central Nat. Bank (Pa. Sup.) 40 Atl. 97; Myers *v.* Bank (Pa. Sup.) 44 Atl. 280. Reference to the same authorities indicates that the return to the depositor of his check with a forged indorsement, with the balanced pass book, casts on him only the duty of exercising reasonable diligence and care to examine the vouchers and the account as stated by the bank, and to inform it of any errors thus discoverable. As, in the present case, the plaintiffs were not in fact acquainted with Miss Young's signature, and there is no ground for claiming that they ought to have known it, they did not fail in duty to the bank by not discovering the forgery on return of the check. Indeed, they were entitled to assume that the bank, before paying the check, had ascertained the genuineness of her apparent indorsement. The *prima facie* case of the plaintiffs being thus made out, it remains to consider the grounds of defense.

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of Depositor.

It appeared in evidence that in June, 1898, Kelly, who had then become the owner of the bond and mortgage, called on Miss Young about the interest; that she then told him she knew nothing about such a mortgage, that that was the first she had heard of it, and that she would see Applegate next morning at his office; that on the next morning, at Applegate's office, Kelly first had an interview with Applegate, then the latter had an interview with Miss Young, and immediately afterwards Miss Young told Kelly that it was all right, and Mr. Applegate was going to settle it soon.

On this evidence the defendant insists, in the first place, that a question of fact for the determination of the jury was raised,—whether Miss Young had not thus validated the bond and mortgage, and consequently the indorsement of the check. But we think her words and conduct are not reasonably capable of such a construction. Their manifest import is that the bond and mortgage were not executed by her, but that they placed an obligation on Applegate, which

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she believed he would soon settle, and so make the matter right. They give no sign of any sense of obligation or purpose of settlement on her part.

The defendant secondly insists that Kelly, by his failure to give to the plaintiffs prompt notice of the forgery, as to which he was at least put on inquiry by what Miss Young told him in June, 1898, had lost his right to recover from the plaintiffs the money which he had left with them to be paid to Miss Young for her bond and mortgage, and which had not been so paid, and thus the payment made to Applegate had become, as between Kelly and the plaintiffs, a constructive payment to Miss Young, and consequently should be deemed such a payment as between plaintiffs and the bank. Whatever may be said of the equities of the situation thus presented, this roundabout imputation of negligence cannot prevail at law. The principle on which negligence may preclude a depositor from recovering of his bank the money paid by the bank on a forged check is thus stated by COCKBURN, C. J., in *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, 190: "The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment. The banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuitry of action, the right of the banker to immunity from loss so brought about would afford to him a defense to an action by the customer to recover the amount." This view received the approval of the court of exchequer in *Halifax Union v. Wheelwright*, L. R. 10 Exch. 183, 192, and of GREY, C. J., in *Bank v. Stowell*, 123 Mass. 196, 201. This principle affords no foundation for the defendant's proposition, for Kelly's negligence could not form a legal basis for an action by the bank against the plaintiffs. Looked at in another aspect, the same result is reached. The legal duty of the bank to answer to the plaintiffs for the amount of their

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deposits did not arise from Kelly's acts, and was not dependent on the state of accounts between him and them, and therefore cannot be affected by showing that he has no claim upon them. His formal release of all claims against them could not impair their legal right to insist that the bank should perform its contract with them as depositors. The opposite doctrine would involve the plaintiffs in a peril which they should not be required to incur, for the question whether Kelly has lost his right of action against them cannot be conclusively settled against them until he has been heard, and he cannot be heard in the litigation now pending. We think the proffered defenses were rightly overruled, and the judgment for the plaintiffs should be affirmed.

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v.

UNITED STATES NAT. BANK.

(*Supreme Court of Nebraska, Nov. 23, 1899.*)

Check for Amount Greater than Deposit—Transfer of Deposit.*—
A bank will not be obligated to pay a check in a sum greater than the amount to the credit of the drawer in his account with the bank, nor does the check operate a transfer or an assignment of the lesser amount of the account.

(Syllabus by the Court.)

ERROR by plaintiff to Douglas county district court. *Affirmed.*

Cavanagh & Thomas and *Edward F. Pettis*, for plaintiff in error.

W. D. McHugh, for defendant in error.

HARRISON, C. J. The plaintiff, also plaintiff in error in this action, commenced in the district court of Douglas county, alleged for cause that one C. E. Wilson, being indebted to it in the sum of \$716.22, drew in its favor, and

*See monographic note, 1 Banking Cases 190 *et seq.*

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delivered to it, a check for said amount on the Commercial State Bank of Crawford, this state, which check was deposited for collection with the National Bank of America of Chicago, and by it forwarded to the defendant bank for collection, and by it forwarded to the Crawford Banking Company of Crawford, Neb., for collection, and by it collected; that the last-mentioned bank drew its check on the defendant bank, payable to the order of M. T. Barlow, cashier of the defendant bank. On the day the check was received by the defendant, the Crawford Banking Company had on deposit with the defendant \$569.82. The check, when received, was stamped "Paid." This was on the morning of December 10, 1894, about 9 o'clock. The defendant held two notes of \$500 each against the Crawford Banking Company, which, however, were not due on the date last stated, and during the day, at a time later than the reception and stamping of the check, canceled the mark or stamp of "Paid," and applied the funds of the Crawford Banking Company on deposit with defendant in payment on the unmatured debts of the banking company to defendant. Demand on defendant for payment to plaintiff of the amount of the deposit with defendant in favor of the banking company at the time of the reception of the check was pleaded; also a refusal of such payment. The answer of defendant, after some preliminary statements, of which further notice is unnecessary, was as follows: "Admits the indebtedness of Wilson to plaintiff, as therein alleged; admits the execution of the check therein mentioned, and that said check was transmitted to this defendant, and by this defendant transmitted to the Crawford Banking Company, as in said amended petition alleged; admits that the said Crawford Banking Company accounted for said collection by inclosing to this defendant a check for \$715.52 on this defendant to the order of M. T. Barlow, cashier; that said M. T. Barlow then was, and now is, the cashier of this defendant, but this defendant denies that at the time said check was received by this defendant the said Crawford Banking Company had any

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account whatever to its credit with this defendant. This defendant admits that the said check was stamped and marked 'Paid,' but denies that the same was stamped and marked 'Paid' by this defendant, and alleges that the said check was stamped and marked 'Paid' by a clerk, who had no authority whatever to pay said check, or bind this defendant in respect thereto; and that the same was placed thereon by mistake of fact, and in error, and that the same was not the act of this defendant, or binding upon this defendant. This defendant further alleges that during all the times mentioned in the amended petition of the plaintiff herein, and for a long time prior thereto, there prevailed and was in the city of Omaha, where this defendant does business, and throughout the state of Nebraska, and in said city of Crawford, and among bankers generally, and there is now among bankers in said city and state and elsewhere, a general custom to credit upon indebtedness, whether due or otherwise, held by a bank, the funds in the possession of the bank, the deposit to the credit of a debtor, whenever said debtor becomes or is insolvent; that said custom was well known to the parties hereto and said Bank of Crawford, and all the parties mentioned in the amended petition herein, and that all the transactions named in said amended petition were taken and had with reference to said custom, and subject to the same, and with full knowledge thereof, and in complete acquiescence therein. Defendant further denies each and every allegation in said petition contained not herein admitted to be true." To this answer there was no reply. A trial resulted in a judgment for defendant.

The plaintiff, in an error proceeding to this court, contends that the check of the Crawford Banking Company on defendant operated an assignment of the amount of the former's deposit with the latter; that, as against the plaintiff's rights, the defendant could not apply the amount of said deposit in payment of the debts of the Crawford Banking Company to defendant not then due; that defendant could not refuse payment to plaintiff of the amount of the deposit,

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although it was less than the sum for which the check called. It had been decided by this court that: "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof,—in effect, an assignment of the amount of the check,—and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name." *Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528. See, also, *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346. And further: "As against the holder of a check against an account of a depositor the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent." *Columbia Nat. Bank v. German Nat. Bank*, *supra*. But in each of the cases just cited the amount of the deposit to the credit of the drawer of the check exceeded the sum stated in the check. In the case at bar the amount on deposit was less than the amount of the check, and, the check being for a sum greater than stood to the credit of the drawer, the bank was under no obligation to pay the check, or to make the partial payment. The check was not operative as an assignment, since the funds were not present to meet it. The bank was not obligated to pay it, in whole or in part, and it did not transfer the fund. *Rouse v. Calvin*, 76 Ill. App. 362; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; *Coates v. Preston*, 105 Ill. 470; *Dana v. Bank*, 13 Allen, 445; *In re Brown*, 2 Story, 512, Fed. Cas. No. 1,985; *Jacobson v. Bank*, 66 Ill. App. 470; 3 Am. & Eng. Enc. Law (2d Ed.) 835; *Beauregard v. Knowlton*, 156 Mass. 395, 31 N. E. 389. Counsel for plaintiff in error cite us to the decision in the case of *Bromley v. Bank*, 9 Phila. 522, to sustain their contention. We have examined this decision, but deem the doctrine of the opinions to which we have referred the better and sounder, and supported by superior reasons. The judgment of the trial court is affirmed.

Dillman v. Carlin

DILLMAN

v.

CARLIN.

(Supreme Court of Wisconsin, Nov. 24, 1899.)

Findings of Fact—Appeal—Review.—Findings of fact made by the trial court cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence.

Rights of Check Holder—Equitable Ownership of Deposit.*—If the owner of a bank credit gives a check thereon, for value; to another, with intent to transfer such credit, or a part of it, to such other, the latter will thereby be constituted at least the equitable owner of such fund or sufficient thereof to satisfy the check, so that whether the bank be legally liable to the check holder or not, if by any means the parties interested are brought into a court of equity while the bank is yet the debtor and can be protected against paying its debt twice, and it stands indifferent as to who gets the money so long as it is protected, the check holder will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the bank.

APPEAL by plaintiff from Brown county circuit court.
Affirmed.

This was a garnishee action. The principal defendant, Schmidt, having \$150 to his credit in the savings department of the Citizens' National Bank of Milwaukee, gave his check in due form to P. H. Carlin, the respondent, for the whole thereof, intending thereby to transfer such credit to him to pay for a horse and some other personal property. Several days after the check was received by Carlin, and before it was presented for payment, the bank was duly garnished by the appellant in this action. The bank credit was not subject to be drawn on by check, or otherwise than by the depositor, or his assignee, presenting the proper depositor's book. That condition was not known

Case Stated.

*See comprehensive note, 1 Banking Cas. 190 *et seq.*

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or understood by either Schmidt or Carlin when the transaction mentioned took place. It thereafter came to their knowledge, whereupon Schmidt delivered his depositor's book to Carlin. About eight days after Carlin received the check, and before he presented it for payment, the bank was garnished by appellant. Two days afterwards the check was presented for payment, but was not paid because of the pendency of the garnishee suit. The bank answered in such suit, admitting the indebtedness to Schmidt, alleging a willingness to pay the same to the person legally entitled thereto, and submitting the question as to the ownership of the fund to the court, asking, however, to be allowed to discharge itself from liability by paying the money into court. That request was granted and the money was so paid. Thereupon Carlin was interpleaded as a defendant and the controversy was tried directly between the two claimants for the money. The court found that Carlin was the *bona fide* owner and holder of the check for value; that he received it in the regular course of business and in good faith; that he became such owner and holder before the commencement of the garnishee suit; that the bank credit upon which the check was given was in the savings department of the bank and not subject to be drawn by check under the rules of the bank, except upon presentation of the depositor's book, which fact was not known to either Carlin or Schmidt when the check was given and received; that the check was given with intent to transfer the bank credit to Carlin, and that as soon as Schmidt learned that presentation of the depositor's book was requisite to secure payment of the money, he delivered it to Carlin. Upon such facts the court decided as a matter of law that the check holder was the equitable owner of the money and entitled thereto in preference to the appellant. Judgment was rendered accordingly.

Sheridan & Evans, for appellant.

Greene, Vroman, Fairchild, North & Parker, for respondent.

Dillman *v.* Carlin

MARSHALL, J. (after stating the facts). These two questions are presented for decision on this appeal: (1) Are the findings to the effect that the respondent took the check from Schmidt for value and in good faith as to the latter's creditors, and with intent on the part of both parties to the transaction that the bank credit drawn upon should thereby be assigned to respondent, supported by the evidence? (2) Did such facts constitute respondent the legal or equitable owner of the indebtedness of the bank to Schmidt?

The first proposition is ruled by the familiar doctrine that findings of fact made by a trial court cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence. Applying that test to the record, no error is discovered.

Findings of Fact
—Appeal—Re-
view.

The second proposition is ruled by *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847, and *Skobis v. Ferge* (Wis.) 78 N. W. 426. At least since the decision in the first case cited, it has been the law of this state that if the owner of a bank credit give a check thereon, for value, to another, with intent to transfer such credit, or a part of it, to such other, the latter will thereby be constituted at least the equitable owner of such fund or sufficient thereof to satisfy the check, so that whether the bank be legally liable to the check holder or not, if by any means the parties interested are brought into a court of equity while the bank is yet the debtor and can be protected against paying its debts twice, and it stands indifferent as to who gets the money so long as it is protected, the check holder will be preferred to the drawer or any subsequent claimant, whether by assignment of the drawer or by legal process served upon the drawee. In the *Skobis* Case that rule was affirmed and applied.

Rights of Check
Holder—Equi-
table Ownership
of Deposit.

It is well understood that there is much conflict in the authorities as to the rights of a holder of a bank check or order payable out of a particular fund under such circumstances as exist in this case. It is useless to try to har-

Henderson Trust Co. v. Ragan

monize them or do more than to recognize the existence of the conflict.

The law of this state, as indicated, is firmly established. It accords with what is stated by standard text writers to be the true doctrine. Daniels, Neg. Prom. Notes, §§ 22, 1638, 1643. A check for a part of a bank credit, intended to transfer such credit, *pro tanto*, operates that way in equity as against any subsequent claimant thereof, saving the rights of the drawee, particularly as to being obliged to pay such part of the fund twice. A check intended to transfer an entire fund operates that way at law, saving as before, the rights of the drawee, timely and sufficient notice being required to fix its liability to the assignee. The whole subject referred to was so thoroughly discussed by MR. JUSTICE DODGE in the Skobis Case that most questions that are likely to arise in respect to the rights of the owner of a check or order for payment out of or by a fund in the hands of the drawee, will be found there sufficiently answered.

The judgment of the circuit court is affirmed.

HENDERSON TRUST CO.

v.

RAGAN *et al.**(Court of Appeals of Kentucky, Sept. 26, 1899.)*

Payment of Check—Forged Indorsement—Effect of Drawer's Negligence.*—Where money is paid upon a pretended, not a real, indorsement of the name of the payee, in law, the check remains unpaid, and cannot diminish the funds of the drawer in the bank, or deprive the payee of any right; and this rule applies where the check was refused by the payee because written with a pencil, and carelessly thrown away by the drawer in the presence of the payee; and paid on a forged indorsement of the payee's name, prior to the presentation of a similar check written in ink, and bearing a genuine indorsement by the payee.

*See notes at end of case.

Henderson Trust Co. v. Ragan

APPEAL by defendant from Henderson county circuit court. *Affirmed.*

Yeaman & Yeaman, and *John W. Lockett*, for appellant.
Montgomery Merritt, for appellees.

PAYNTER, J. One J. A. Oldham borrowed of Ragan & Tibbs \$100. At the time he did so he had on deposit to his credit in the appellant, the Henderson Trust Company, \$112. In payment of the \$100, he tendered a check on it payable to the order of Joseph Tibbs, a member of the firm of Ragan & Tibbs. This check was written with a pencil, and Tibbs declined to accept it because it was not written with ink and payable to the order of the appellees. Thereupon, Oldham threw it at or in a spittoon on the floor without tearing or mutilating it. He then wrote another check for \$100, payable to the order of Ragan & Tibbs, and tendered it to them, which was accepted. Before this check was presented for payment, the check which was drawn in pencil was presented to the trust company for payment, purporting to have been indorsed by James Tibbs and by Wilson, and one Sutton, who presented it for payment, indorsed it. It turned out that the indorsement of Tibbs' name on the check was a forgery. When the check payable to Ragan & Tibbs was presented for payment, there was but \$12 to the credit of Oldham, and the trust company refused to pay it. This suit was instituted on the check payable to the order of Ragan & Tibbs. The court substantially told the jurors, if they believed the facts as stated, to find for the appellees.

It is insisted on behalf of the appellant that Oldham was guilty of great negligence in throwing the check upon the floor, making possible the fraud which was practiced upon the trust company; therefore the payment of it by the trust company should be treated as a discharge, to the amount of the check, of its indebtedness to Oldham. The court refused to give that instruction. The rule is well settled that, if a bank pays a check on a forged indorsement, it must sustain the loss. Tied. Com. Paper, § 449. Where

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money is paid upon a pretended, not a real, indorsement of the name of the payee, in law, the check remains unpaid, and cannot diminish the funds of the borrower in the bank, or the money in the pocket of the person entitled to the payment. *Bank v. Whitman*, 94 U. S. 347. The check written in pencil did not authorize any one to present and receive money on it from the trust company, as it was never delivered to, or accepted by, the payee, James Tibbs, a member of the firm of Ragan & Tibbs, for himself or his firm, and he was never at any time guilty of any negligence, and no effort was made by the trust company to ascertain whether or not the check or indorsement, thereon were genuine. Sutton seems to have been a man of bad character. Oldham was certainly guilty of great negligence in throwing the check upon the floor. The trust company should not have paid the check, according to the facts presented by this record. Without deciding the question which might arise between the trust company and Oldham, it is sufficient to say that Ragan & Tibbs were in no wise guilty of negligence in the transaction, and they should not sustain a loss caused either by reason of the negligence of the trust company or Oldham or both. Although Oldham was guilty of negligence, yet the trust company was likewise guilty of negligence in paying the check without inquiring as to the genuineness of the indorsements thereon. In our opinion, they were entitled to have their check paid when presented, as the withdrawing of the money on the check in pencil did not deprive them of the fund in bank which was there for the payment of their check. The judgment is affirmed.

NOTES.

Checks—Payment on Forged Indorsement of Payee—Liability of Bank to Payee.—A drawee bank paying a check on the forged indorsement of the payee, in the absence of some special matter, such as an acceptance of the check, creating a privity between the bank and the payee, is not liable to the payee for the amount of the

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check. *Washington First Nat. Bank v. Whitman*, 94 U. S. 343; *Freeman v. Savannah Bank, etc., Co.*, 88 Ga. 252; *I. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 132; *Ætna Nat. Bank v. New York Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Dec. 314.

In *Carr v. Nat. Security Bank*, 107 Mass. 45, 9 Am. Rep. 6, the court, in delivering the opinion, said: "A check drawn by him (the depositor) in common form, not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due to him from the bankers at the time, is a mere contract between the drawer and the payee, on which, if payable to bearer, and not paid by the drawees, any holder might doubtless sue the drawer (as suggested in *Ancona v. Marks*, 7 H. & N. 686, 696, cited for the plaintiff), but which passes no title, legal or equitable, to the payee or holder, in the moneys previously paid to the bankers by the drawer; and the bankers' promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise. The view, thus briefly stated, is in accordance with the law as established in England, in New York and in Pennsylvania, with the opinions heretofore expressed by this court, and with the recent unanimous decision of the supreme court of the United States. *Foley v. Hill*, 1 Phil. Ch. 399, and 2 H. L. Cas. 28; *PARKE, B.*, in *Bellamy v. Marjoribanks*, 7 Exch. 389, 404; *Addison on Cont.* (6th Ed.) 810; *Chapman v. White*, 6 N. Y. 412, 417; *Loyd v. McCaffrey*, 46 Penn. St. 410, 414; *Bullard v. Randall*, 1 Gray. 605; *Dana v. Third National Bank*, 13 Allen, 445; *Bank of the Republic v. Millard*, 10 Wall. 152."

Same—Same—Liability of Bank to Drawer.—Where a check is paid upon a forged indorsement of the payee's signature, the check, in law, remains unpaid, and, where the drawer is chargeable with no negligence, cannot diminish the funds of the drawer deposited in the bank. *Wash. First Nat. Bank v. Whitman*, 94 U. S. 343; *Hatton v. Holmes*, 97 Cal. 208; *Bristol Knife Co. v. Hartford First Nat. Bank*, 41 Conn. 421, 19 Am. Rep. 517; *Millard v. National Bank of The Republic*, 3 McArthur (D. C.) 54; *First Nat. Bank v. Pease*, 168 Ill. 40, 43 N. E. Rep. 100, 15 Bkg. L. J. 32; *Chicago First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. Rep. 769; *Williams v. Drexel*, 14 Md. 566; *Shipman v. Bank of the State* (N. Y.), 12 L. R. A. 791; *Citizens' Nat. Bank v. Importers, etc., Bank*, 119 N. Y. 195; *Armstrong v. Pomeroy Nat. Bank* (Ohio), 6 L. R. A. 791; *Seventh Nat. Bank v. Cook*, 73 Penn. St. 483, 13 Am.

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Rep. 751; *Pollard v. Wellford*, 99 Tenn. 113, 42 S. W. Rep. 23, 14 Bkg. L. J. 618; *Jackson v. Nat. Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Chism v. First Nat. Bank*, 96 Tenn. 641, 36 S. W. Rep. 387, 32 L. R. A. 778, 13 Nat. Corp. Cas. 136.

Same—Same—Same—Drawer Delivering Check to Forger.—A bank is liable to the drawer of a check for the amount thereof, where it has paid the check on the forged indorsement of the payee's signature, although the check had never been delivered to the payee, but had been delivered by the drawer to the forger, upon his representation that he was the payee's agent. *First Nat. Bank v. Pease*, 168 Ill. 40, 48 N. E. Rep. 100, 15 Bkg. L. J. 32.

The person who forged the indorsement on a check was identified to the drawee bank by one believing him to be the payee, and he was the person to whom the drawer, thinking him to be the payee, had delivered the check. *Held*, that the drawer could not recover from the bank the amount so paid on the forged indorsement. *U. S. v. Nat. Exch. Bank*, 45 Fed. Rep. 163.

Credit to Depositor Equivalent to Payment.—Giving credit to a depositor upon a forged check deposited by him is equivalent to an actual payment. *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vt. 141; *National Bank of N. A. v. Bangs*, 106 Mass. 441; *Levy v. Bank of the United States*, 1 Binn. 36.

In *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 3 Am. & Eng. Corp. Cas. 229, it appeared that a check, dated November 9, 1874, drawn upon plaintiff, a New York city bank, the indorsement of the payees whereon had been forged, was paid by it to defendant, who had received it from a depositor in the regular course of business, and charged it to the drawer's account. In March, 1876, the drawer notified plaintiff of the forgery and commenced suit against it to recover the moneys withheld by it on account of the check. Notice of the suit was given to defendant, judgment was recovered therein against plaintiff, and after payment thereof this action was brought. It appeared that neither plaintiff nor drawer of the check took any measures to ascertain the genuineness of the indorsement until about the time of the commencement of the action; that if this had been done the forgery would have been discovered, and defendant, if it had been notified thereof, could have protected itself from loss by calling upon its depositor.

Held, that defendant was liable for the amount of the check with simple interest from the time of payment; that no duty to defendant rested on plaintiff to examine and ascertain as to the genuineness of the indorsement before payment; and that it was not estopped by the delay; but that defendant was not liable for the costs in the suit against plaintiff.

Thilmany v. Iowa Paper-Bag Co

THILMANY

v.

IOWA PAPER-BAG CO. *et al.**(Supreme Court of Iowa, May 12, 1899.)*

National Banks—Accommodation Letters of Credit*—Ultra Vires.—When a letter of credit from a national bank is not purchased, but is merely a guaranty of the payment of an account to be created in the future, it is not binding on the bank, as such an institution has no power to thus jeopardize its capital.

APPEAL by plaintiff from Wapelle county district court.
Affirmed.

Seneca Cornell, for appellant.

McNet & Tisdale, for appellee.

DEEMER, J. Plaintiff is a manufacturer of paper, doing business at Kaukauna, Wis.; and the defendant, the Iowa Paper-Bag Company, is a manufacturer of paper bags, doing business at the city of Ottumwa, in this state. In the year 1894 the paper bag company, desirous of purchasing paper of plaintiff, secured from the vice president of defendant bank the following guaranty: "Edwin Manning, Prest. Wm. Daggett, Vice Prest. Calvin Manning, Cashier. W. R. Daggett, Asst. Cashier. No. 1,726. Iowa National Bank. Capital Stock, \$200,000.00. Ottumwa, Iowa, December 8, 1894. Thilmany Pulp and Paper Company, Kaukauna, Wis.—Dear Sirs: The Iowa Paper-Bag Company, of this city, desire to establish business relations with you, and request us to write you. We will guaranty the fulfillment of their obligations to you, to the extent of the cost of a car load of bag paper, for the next twelve months. They are doing a good and safe business, and changed from an Ohio

*See note, 1 Banking Cases 39.

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paper mill to your mill at our request. We hope you will give them all advantage possible, as their competition comes from Ohio bag factories, and is sharp in this district; looking, doubtless, to driving this bag company out of the Southern Iowa market. Yours, etc., Iowa National Bank, by Wm. Daggett, V. P." This letter it inclosed, with an order for a car of paper, in a letter addressed to the plaintiff; and plaintiff thereupon shipped a car of paper to the bag company. The purchase price for this car was promptly paid, and thereafter plaintiff shipped five other cars, all of which were paid for, except the last. This action is to recover the purchase price of the last car, from the bag company on its order, and from the bank on the letter of credit above set out. When plaintiff offered the letter in evidence, it was objected to by the bank on the following grounds: "Incompetent, immaterial, and because the national bank has no authority or power to guaranty the payment of commercial bills, or to bind itself by a guaranty such as [the letter referred to]." This objection was sustained, and the ruling is assigned as error.

Counsel concede that the controlling question in the case is whether or not a national bank has power to issue such a letter of credit or of guaranty as the one offered in evidence. National banks are creatures of the general government, and their powers are enumerated as follows: A national bank can "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." Rev. St. § 5136. This act expressly confers upon such banks all incidental powers necessary to carry on the banking business. "These powers," as said by the supreme court of the United States in *Bank v. Armstrong*, 152 U. S. 351, 14 Sup. Ct. 574, "are such as are required to meet all the legitimate demands of

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the authorized business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others." The statute we have quoted does not give national banks express authority to issue letters of credit or to make instruments of guaranty. Neither does it expressly authorize the indorsement of notes or bills of exchange. But, as indorsement is often necessary to the transfer of negotiable instruments, it is clearly within the power of such banks to make this kind of contract. And so it has been held that, as a guaranty is a less onerous and stringent contract than that created by an indorsement "waiving demand and notice," such a contract is also good when made with reference to the transfer of notes in which the bank has an interest. *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181. When either contract has relation to a transaction in which the bank has a pecuniary interest, as where made to transfer or negotiate choses in action, or negotiable instruments which it owns or in which it has an interest, there is no longer room for doubt as to the validity of the transaction. But a guaranty of a note or bill or of an account as of a mere loan of credit to another, disconnected with any transfer of title or ownership of the paper or account guarantied, may well be doubted. Indeed, we think there is a manifest distinction between the right of a bank to guaranty choses in action belonging to it and its right to guaranty those belonging to another. It has been squarely held by the supreme court of the United States that a cashier has no power to indorse accommodation paper so as to bind the bank. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557. The supreme court of Michigan has also held that a cashier has no authority to accept bills of exchange for the accommodation merely of the drawers, and that there can be no recovery thereon by one having knowledge. *Farmers' & M. Bank v. Troy City Bank*, 1 Doug. 457.

But, as not all contracts of guaranty or letters of credit are

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void, resort must be had to the instrument itself, and, it may be, to evidence *aliunde*, to determine the effect of the particular instrument in question. Letters of credit are of two kinds. When purchased by the person desiring credit, or procured by the use of checks or other securities lodged with the person who grants it, it is, in effect, a bill of exchange; and as it is based on a consideration passing directly to the bank that issues it, and has gained recognition in the commercial world, it is a valid and binding contract, and may be entered into by national banks. Daniel, Neg. Inst. § 1794. When the letter is not purchased, but is purely an accommodation, or simply a guaranty of the payment of an account to be created in the future, it is not binding on a national bank, for such an institution has no power to thus jeopardize its capital. Such transactions are not necessary to the exercise of powers granted to national banks, and are therefore without their charter powers, and invalid. The controlling question in the case is, to which class of contracts does the one in suit belong? We are of the opinion that the letter, on its face, shows it belongs to the latter class. There is nothing on the face of the instrument to indicate that the paper-bag company purchased the letter, or that it had deposited any money or collaterals to secure the same. It is simply a promise to guaranty the fulfillment of the obligation of the bag company. True, when accepted by the plaintiff, a consideration is presumed, and need not ordinarily be alleged or proven. But this consideration may have been simply the disadvantage to the seller, or the benefit conferred upon the purchaser. There is no presumption that the paper-bag company gave anything for the letter, or that anything was withheld from it on account of the issuance thereof. The case does not differ materially from one where a member of a firm has signed the name of his partnership to a note as surety. In such case the holder cannot recover without showing that all the members of the firm assented. *Bank v. Law*, 127 Mass. 72; *National Park Bank v. German-American Mutual Warehousing & Security Co.* (N. Y. App.)

National Bank of Commerce *v.* American Exch. Bank

22 N. E. 567; *Bank v. McDonald*, 127 Mass. 82. As the instrument in suit clearly shows on its face that it is simply a contract of guaranty, there can be no recovery without proof that it was, in effect, a bill of exchange; and it may be (a point, however, which we do not decide) that evidence to establish such fact would be inadmissible because of the form of the letter.

Again, the plaintiff sues upon the instrument as a contract of guaranty; and it is well settled, as we have heretofore observed, that such contract is invalid unless made in connection with the transfer of a chose in action or other property belonging to the bank. See, as further sustaining this proposition, *Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 7 Wis. 59; *Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457; *Norton v. Bank*, 61 N. H. 589; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Beecher v. Dacey*, 45 Mich. 92, 7 N. W. 689. The cases referred to by appellant all involve the negotiation or transfer of negotiable instruments belonging to the bank, or in which it had an interest, and are therefore not in point. As the contract is strictly one of guaranty, the presumption is that the bank had no authority to issue it, and the trial court correctly refused to admit it in evidence. Affirmed.

NATIONAL BANK OF COMMERCE OF KANSAS CITY

v.

AMERICAN EXCH. BANK OF ST. LOUIS.

(Supreme Court of Missouri, June 15, 1899.)

Collections—Accepting Worthless Check for Draft.*—The H. bank sent a draft, of which it was the holder for value to the A. bank for collection, and the latter forwarded it to the plaintiff bank for collection and return. And plaintiff accepted the drawee's check on

*See notes at end of case.

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another bank in payment of the draft which it delivered to the drawee, and remitted the amount of the draft to the A. bank. The check proving to be worthless, plaintiff brought an action against the A. bank to recover the amount of the remittance. *Held*, that when plaintiff received the check and surrendered the draft, it made the check its own and its liability to the H. bank became fixed,—as much so as if it had received the cash; and there could be no recovery.

Same -- Nonpayment — Delay in Notification.—The draft was received by plaintiff after banking hours, and, if demand for its payment in money had been made upon the drawee that evening, and refused, and prompt notice of its nonpayment given to the H. bank, it would have received the notice from 24 to 36 hours sooner than it was received; and such delay may have prevented the H. bank from attaching some of the drawee's property. *Held*, that the contention that neither plaintiff nor the H. bank sustained any damage by reason of plaintiff's acceptance of the check in payment of the draft was without merit.

Payment by Mistake.—Plaintiff carelessly took such check from the drawee of the draft on the faith of his solvency, and without being induced to do so by any fraud. *Held*, that plaintiff's mistake as to the drawee's solvency was not such a mistake of fact as entitled it to recover the amount of the remittance from defendant.

APPEAL by plaintiff from St. Louis circuit court. *Affirmed*.

Elijah Robinson, for appellant.

Thos. E. Ralston, for respondent.

BURGESS, J. This is an action to recover the sum of \$9,000, the amount of a draft sent by the Hide & Leather National Bank of New York to the defendant, at St. Louis, for collection, and by it forwarded to plaintiff, at Kansas City, Mo., for collection and return. The action is predicated upon its alleged justifiably mistaken belief with respect to the solvency of the drawee, one Frank E. Tyler, who was doing business under the name of Benj. McLean & Co., because of which plaintiff took his check on another bank for the draft, and delivered the draft to him, and on the same day sent its draft to defendant for the amount, supposing the check to be good, and that it would be paid on presentation in the usual course of business.

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But the check proved to be worthless. The case was tried by the court, a jury being waived. There was a judgment for defendant, and plaintiff appeals.

For several years prior to April 21, 1893, Frank E. Tyler had been doing business in Kansas City, New York, and a number of other places, under the name of Benj. McLean & Co. On the 17th day of April, 1893, his New York representative, in the name of Benj. McLean & Co., drew a draft upon him in favor of the Hide & Leather National Bank, of that city, for \$9,000, on Benj. McLean & Co., Kansas City, Mo., which was on the same day delivered to the Hide & Leather National Bank, and by it placed to the credit of the drawers. On the same day that the Hide & Leather National Bank received said draft, it forwarded it, together with some other collections, to its correspondent, the defendant bank, for collection; at the same time, according to its custom, charging the same to defendant, which, upon their receipt by defendant, were credited to the Hide & Leather National Bank. The defendant received the draft on the 19th day of April, 1893, and on the same day sent it by mail to the plaintiff for collection, by whom it was received at the opening of the bank for business on the following morning. Tyler's place of business was at Armourdale, Kan., some five or six miles from the National Bank of Commerce; and upon receipt of the draft the plaintiff bank informed him by telephone that it held it for collection, whereupon Tyler promised to send over and pay the same. This was the customary way of making collections from Tyler. But in this instance there was evidence upon the part of the defendant which tended to show that the draft upon Tyler was accompanied by a letter from it containing the following, to wit: "Caution. Protest all papers, and deliver no bills of lading without payment of draft, unless otherwise instructed. Wire nonpayment items over \$500. Return promptly all unpaid items." Upon the part of plaintiff, however, there was evidence tending to show that this letter was never received by it. At the same time plaintiff received the draft in

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question from the defendant, it also received from the St. Louis National Bank, for collection, another draft on Tyler, for \$1,283.20, to which there was a bill of lading attached. About 3.30 in the afternoon of the day upon which Tyler was notified by plaintiff that it had the \$9,000 draft for collection, he sent to plaintiff his check on the Metropolitan National Bank of Kansas City for the amount of both of said drafts; and upon the receipt thereof the plaintiff surrendered to him both of said drafts and the said bill of lading, and remitted to defendant the amount of the \$9,000 draft. At that time Tyler's financial standing seems to have been unquestioned. When Tyler's check was received by plaintiff, it was after banking hours, but the next day, the 21st, it was placed in the clearing house for collection. The taking of the check, and placing the same in the clearing house the next day for collection, seem to have been in accordance with the prevailing custom among the banks of Kansas City in regard to such collections. The Metropolitan Bank refused payment of the check, of which the plaintiff was notified about 3 o'clock in the afternoon of the 21st, and that evening plaintiff's assistant cashier notified defendant by wire of its nonpayment, and requested it not to remit the amount to the Hide & Leather National Bank; but the telegram was not received by defendant until the morning of the 22d, when defendant wired the Hide & Leather National Bank that plaintiff claimed to have remitted through mistake, and asked it to cancel the charge made against defendant's account, which it refused to do. Tyler was indebted to said Hide & Leather National Bank on a note in the sum of \$10,000, which was independent of this \$9,000 transaction; and on the 24th of April it began suit against him in New York on said note, and attached everything he had in that state, and realized out of the attached property about \$7,000. In the evening of the 21st, Mr. Schwitzgeble, plaintiff's assistant cashier, caused a suit to be brought against Tyler in the district court of Kansas City, Kan., and a writ of attachment to be issued, which was

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levied on some property supposed to belong to him. There was never any personal service, but he was notified by publication, and on July 12, 1896, judgment by default was entered in this case. The property levied upon under the writ of attachment in this case was covered by a prior lien—a mortgage—for a great deal more than its value, and also by a prior attachment in favor of the Metropolitan National Bank, and nothing was ever realized out of this suit. On the morning of the 22d of April the plaintiff wired to several different places where Tyler was supposed to have property, directing the bringing of attachment suits. A small quantity of property was found and levied upon at El Paso, Tex., and also at Albuquerque, N. M.; but soon thereafter an agreement was made between plaintiff and Tyler whereby the proceeds of this property, less expenses, were turned over to plaintiff, and applied to reimbursing it for the amount paid on the said \$1,283.20 draft to which the bill of lading was attached, and was not fully sufficient for that purpose. Thereupon all attachment suits were to be dismissed, and all were dismissed except that at Kansas City, Kan., which through some oversight was not dismissed. Plaintiff supposed it had been dismissed. At the time of the institution of these suits, and for a long time thereafter, the plaintiff had no knowledge as to the actual facts connected with said \$9,000 draft; not knowing the circumstances under which the same was taken by said Hide & Leather National Bank, or whether said bank had paid out anything on the faith of the remittance by plaintiff to defendant. Soon after the institution of these suits, plaintiff wrote to defendant that it would look to it for said \$9,000, but that it believed the money might be collected from Tyler by prosecution of these suits, and regarded it more just that Tyler's property should pay it than that either of the banks should lose it, and that, unless defendant informed it to the contrary, plaintiff would take it for granted that it was understood between it and defendant that it should treat the claim as its own, and make an effort to collect the money,

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and that by doing so it should not waive any of its rights as between it and defendant. To the letters containing these statements, Walker Hill, defendant's cashier, replied by letter of date April 29, 1893: "I wired New York, on Monday, 'If possible, withhold credit;' but they declined to release us, if we had proceeds of items in our hands. * * * I will say to you and your attorney, in the most emphatic language, that any suits you may bring to get your money back from McLean will be at your cost and risk, as this bank denies any liability, legally, morally, or any other way." Neither the defendant nor the Hide & Leather National Bank sustained any damage or lost any remedy against or recourse upon said Tyler or his property, or any one else, by reason of anything done by plaintiff concerning said draft. Tyler was hopelessly insolvent, and the said Hide & Leather Bank levied upon, and subjected to the payment of another claim, all the property he owned, except the small quantity, the proceeds of which were received by plaintiff as above stated. This action was begun on the 17th day of March, 1894, and thereafter plaintiff took depositions, and ascertained the facts above stated as to the connection of said Hide & Leather National Bank with said \$9,000 draft, and the suit by said bank against said Tyler. At the close of all the evidence the court declared the law to be that, under the pleadings and all the evidence in the action, the plaintiff could not recover, and in accordance therewith rendered judgment for defendant.

1. In passing upon the action of the court in declaring the law to be that, under the pleadings and evidence, plaintiff was not entitled to recover, every reasonable intendment in favor of the plaintiff is to be drawn from the evidence adduced; and if, from all the facts disclosed, there was any substantial evidence tending to show that plaintiff was entitled to recover upon the whole case, it should have been submitted. But, upon the other hand, if either one of the defenses set up by defendant was a good defense to plaintiff's action, and

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was sustained by the evidence, which was all one way, and with respect to which there was no conflict, then the law was properly declared. With these legal principles in view, was plaintiff guilty of negligence in its manner of handling the collection of the draft in question? Plaintiff contends that it was not, and that, in taking from Tyler his check on the Metropolitan Bank and in putting it in the clearing house for collection, it did all that it was legally required to do; that being the usual and customary way of transacting such business. In 1 Morse, Banks (3d Ed.) § 252, it is said: "If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper to him, it assumes the responsibility for the check proving good. If it is not paid, the bank is still obliged to pay the amount to the person from whom it received the paper." Bank of Autigo *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029. The general rule is that an agent, being authorized to receive money only, has no implied power to receive a check or anything else except money in payment, and if he does so he assumes the risk of its payment, and becomes liable to his principal for the amount of the check, with interest from the date of its receipt by him. Essex Co. Nat. Bank *v.* Bank of Montreal, 7 Biss. 193, Fed. Cas. No. 4,532. In such circumstances the law will presume damages to the principal, and dispenses with proof thereof. 1 Daniel, Neg. Inst. (4th Ed.) § 335. Later on the same author says: "In the United States it is quite certain that a banker or other agent holding a bill or note for collection would act at his peril in delivering it up on a receipt of a check for the amount, and that if the debtor did not pay the amount in money, and drawers or indorsers were not duly notified, they would be discharged, and the loss would fall upon the collecting agent. * * * This seems to be the correct doctrine, for the agent exceeds authority in taking the check, and therefore acts at his peril. And while it may be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of

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debts, and frequently to surrender other instruments on receiving them, such a practice on the part of the principal falls far short of a usage which would permit the agent to do likewise." *Id.* 1625. When plaintiff bank received Tyler's check on another bank in payment of the draft of the Hide & Leather Bank on him, and surrendered to him the draft, it made the check its own, and its liability to the Hide & Leather Bank became fixed,—as much so as if it had received the cash. *Bank v. Ashworth*, 123 Pa. St. 212, 16 Atl. 596; *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 204. It is true that it is said in *Morse, Banks, supra*: "But if the bank can show that it has conducted itself in the transaction in strict accordance with the customary and established mode of transacting such business, it seems that this might suffice to acquit it of all responsibility for any mishap; for it has been held in England that a banker who gave up bills, indorsed to him for collection, upon receiving the acceptor's check, which was subsequently dishonored, could not be charged with negligence, because the transaction was not an unusual one. It may be doubted whether it would free a banker from liability if he should simply show a frequent habit of parting with paper upon receiving the check of the debtor, or whether he would not have to go further, and show positively that it was understood in all such transactions that the banker discharged his full duty to his customer by so doing. Otherwise, the usage might amount only to a usage of bankers to assume a liability to their customers in such cases." But it must be apparent to any one reading the language quoted that the author was not entirely satisfied with the position therein assumed, as the only authority cited in support thereof is *Russell v. Hankey*, 6 Term R. 12, and besides it is not in harmony with what is previously said in the same section. That plaintiff at first regarded the check as its own, and so treated it, is evidenced by the several attachment suits instituted by it against Tyler on the check, and its communications with defendant, both verbal and written, with respect

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thereto. It is true that shortly after the institution of the attachment suits, but not until then, plaintiff wrote to defendant that it would look to it for said \$2,000, but that it believed the money might be collected from Tyler by prosecution of these suits, and that, unless defendant informed it to the contrary, plaintiff would take it for granted that it was understood between it and defendant that it should treat the claim as its own, and make an effort to collect the money, and that by doing so it should not waive any of its rights as between it and defendant; but defendant replied that any suits that plaintiff might bring to get its money back would be at its own cost and risk, and denying all liability upon its part. It does not look reasonable, nor are we disposed to believe, that plaintiff would have pursued this extraordinary remedy in order to collect a debt which it did not regard as its own, and that it would have continued its pursuit, especially after having been notified by defendant that if it did so it would be at its own cost and risk. Whatever the usage may be with respect to the surrender of an obligation for the payment of money to the obligor by the owner thereof upon the receipt of a check given for its payment, as between an agent of the principal and the principal's debtor, it has no application in this case (*Hall v. Storrs*, 7 Wis. 253); for under such circumstances such a usage or custom would be unreasonable, and could not be invoked as a justification for such a course. *Whitney v. Esson*, 99 Mass. 308.

2. But plaintiff contends that neither the defendant bank nor the Hide & Leather Bank sustained any damage whatever by reason of the course pursued by plaintiff, and therefore plaintiff is entitled to recover the money from defendant, regardless of the question as to whether it was negligent in handling the collection of the draft in question. We are, however, unable to agree to this contention. The draft was received by plaintiff after banking hours on the 20th, and, if demand for its payment in money had been made upon Tyler that evening and refused, and prompt notice of its nonpayment

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given to the Hide & Leather Bank, it would have received the notice the same evening, or at any rate, by the next morning, when in fact it did not receive notice of the nonpayment of the check until the 22d,—a delay of from 24 to 36 hours. It is true that, upon receipt of the notice of the nonpayment of the check, the Hide & Leather Bank attached all it could find of Tyler's property in the state of New York, on another claim which it held against him; yet, if the draft had been presented and payment refused, and it had at once been notified on the evening of the 20th, it may be that it could have found other property of Tyler which it could have attached on this debt. But, in the view we take of the case, the measure of damages is of no importance, as in no event is plaintiff entitled to recover.

3. Another contention is that, although the money was paid by plaintiff to defendant as the agent of the Hide & Leather Bank, as defendant was notified, before transmitting it to its principal, that the money was paid through a mistake, it may be recovered back. It seems, both upon principle and authority, that where money has been paid by one joint agent to another through mistake, and it has not been forwarded by the latter to the principal, or he has not done some act before notice of the mistake upon the assumption that the payment was good, by which he would suffer some damage if it should be held invalid, the agent so paying may recover back the money thus paid. *Mechem, Ag. §§ 560-562; Herrick v. Gallagher, 60 Barb. 566; Cox v. Prentice, 3 Maule & S. 348; Buller v. Harrison, 1 Cowp. 568.* That this is the general rule there can be no question, but does it apply to this case? The Hide & Leather Bank was a holder for value of the draft, and was legally entitled to its payment; and if, as we have said, plaintiff, in receiving Tyler's check for the draft, and in surrendering the draft to him, did so without authority, and thereby made the check its own, we are unable to see how defendant or its principal could in any

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way be affected by plaintiff's mistake as to Tyler's solvency and ability to pay the check. Moreover, the insolvency of Tyler was not such a mistake of fact as would entitle the plaintiff to recover the amount of the remittance to defendant in payment of the draft. *Bank v. Richardson*, 101 Mass. 287. Plaintiff took the check from Tyler on the faith of his solvency, and without being induced to do so by any fraud or mistake of fact, or without information or knowledge with respect thereto. It had no right "to act upon mere guesses and surmises" (*U. S. v. Barlow*, 132 U. S. 271, 10 Sup. Ct. 77), and then claim that what it did was through a mistake of fact. *Canterbury v. Bank of Sparta*, 91 Wis. 53, 64 N. W. 311.

It is insisted by defendant that plaintiff having elected to treat the check as its own, and brought several attachment suits thereon against Tyler, it cannot now pursue a different and inconsistent remedy, by prosecuting this suit against it; but, as what we have already said necessarily results in an affirmance of the judgment, it is unnecessary to pass upon that question. For these considerations, we affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

NOTES.

What Banks May Accept in Payment of Collections.—A bank receiving a check or other paper for collection, in the absence of special authority from the owner thereof, accepts in payment at its own risk anything except money. *Ward v. Smith*, 74 U. S. 7 Wall. 451; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *National Bank of Commerce v. Johnson*, 6 N. D. 180, 69 N. W. 49.

Deposits for Collection—Bank as Agent of Depositor.—See *note*, 1 Banking Cases 296.

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(Court of Appeals of New York, Oct. 3, 1899.)

Collections—Negligence in Presenting Check—Payment by Indorser—Liability of Bank.*—Where the failure of a bank receiving a check for collection to present it for payment within a reasonable time is the cause of the loss of the money, an indorser paying the check without knowledge of the bank's negligence can recover the amount from the latter.

Cause of Action—Pleading—Amendments.—A cause of action based upon the omission of the defendant bank to draw out the money upon a check before the failure of the drawee bank is not substantially different, within the meaning of the statute of New York permitting a pleading to be amended at the trial, where it does not substantially change the claim or defense, from a claim to make the indorser of the check good for money paid by him to take up the check in ignorance of circumstances which deprived the collecting bank of the right to demand the money.

Right of Action—Restoration of Worthless Check.—Where the failure of the collecting bank to present a check for payment within a reasonable time results in the loss of the money by the insolvency of the drawee bank, an indorser paying the check in ignorance of the collecting bank's negligence need not, as a condition precedent to a right of action, return the worthless check to the latter before suing it for reimbursement.

Same—Same—Nature of Check.*—The possession to the dishonored check could not aid the collecting bank in establishing a right to share in the distribution of the assets of the insolvent drawee bank; as a check drawn upon a bank generally does not operate as an assignment of the drawer's funds in the bank, and, unless accepted or certified by the bank, creates no obligation against the drawee.

Payment by Mistake—Right of Action—Demand.—Where the failure of the collecting bank to present a check for payment within a

*See notes at end of case.

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reasonable time results in the loss of the money, a demand upon the collecting bank for reimbursement of money wrongfully received by it in payment of the check from an indorser is not a condition precedent to a right of action for reimbursement.

APPEAL by defendant from appellate division supreme court. *Affirmed.*

Charles F. Brown and *William C. Beecher*, for appellant.
John W. Boothby, for respondents.

O'BRIEN, J. The plaintiffs' testator, William Campbell, brought this action to recover from the defendant the sum of \$4,925, which he claimed was paid by him to the defendant by mistake of fact. The original plaintiff died during the pendency of the action, and his executors, the present plaintiffs, were substituted in his place. The courts below have sustained the claim, and awarded judgment against the defendant. The facts upon which the judgment rests were undisputed, and at the close of the case the learned trial judge directed a verdict for the plaintiffs, and there was no request by either party to have any question submitted to the jury.

Case Stated.

It appears that on May 27, 1893, one Peats, being indebted to Campbell, drew his check for the sum above mentioned upon a firm of bankers in Chicago to the order of one Ballou, who was the agent of Campbell, and who received the check in payment of the debt. The payee indorsed and delivered this check to his principal, the original plaintiff in this action. The latter received it after banking hours on the 27th. The next day was Sunday, and on Monday the 29th, at about 10 o'clock in the morning, he indorsed and delivered the check to the defendant, and the depositor was credited with the amount in his account. The check was not presented at the bank in Chicago where it was payable until June 3d, five days after it was deposited with the defendant, and payment was then refused. Had the defendant transmitted the check by mail in the regular course of business, it would have reached Chicago and could have been presented

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for payment at 10 o'clock of the second day after it was deposited; that is, on May 31st. The drawer of the check had at all times sufficient, and more than sufficient, funds in the bank upon which it was drawn, subject to check, to pay it; but on the morning of June 3, 1893, these bankers failed and suspended payment, and when the check was presented that day for payment it was dishonored, and subsequently protested and returned to the defendant. The plaintiffs' testator, who had indorsed and deposited it to his credit, was notified of the dishonor, and, supposing that he was liable upon the paper so indorsed, took it up, paying to the defendant the face of the check, interest, and protest fees. He subsequently brought this action to recover the sum so paid.

The defendant, on receiving the check, assumed the obligation to present it for payment within a reasonable time; and, had this obligation been discharged, the check would have

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been paid, and no one would have sustained any loss from the transaction. That the defendant neglected or failed to perform this duty is a fact in the case that is not now seriously questioned.

The legal effect of the defendant's omission in this respect was to discharge the indorser, and the drawer as well, since the latter had provided funds to meet the check, which were lost by the failure of the bankers upon whom it was drawn. When the indorser paid the check without knowledge of the facts, the defendant received so much money from him to which it was not legally entitled. The plaintiffs' testator, having paid the check without knowledge of the facts which discharged him from all liability as indorser, was entitled to call upon the defendant to restore the money so paid. *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. 763; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849; *Murray v. Judah*, 6 Cow. 490; *Little v. Bank*, 2 Hill, 425; *Lake v. Bank*, 3 Abb. Dec. 10; *Daniel*, Neg. Inst. § 1592. The indorser, therefore, had a good cause of action against the defendant; and unless the points urged by the defendant on this appeal, which will presently be considered, are of sufficient impor-

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tance to defeat the recovery, the judgment must be sustained.

The first objection urged by the learned counsel for the defendant does not relate to the merits, but to the procedure or practice at the trial. The complaint as originally framed stated that the check was received by the defendant from the plaintiff for collection, and that it failed to present it at the bank where payable within a reasonable time, as it was bound to do, and that in consequence of this omission the plaintiff lost the amount for which it was drawn. It was shown at the trial without objection that the plaintiff had been credited with the check, and therefore that the defendant became the owner of it by the transaction, and that the depositor's relation to it was that of indorser. After this proof was all given, the plaintiff requested the court to permit the complaint to be amended by conforming the allegations to the proof. The defendant's counsel objected, but the court ordered the amendment, and the defendant excepted. The complaint was then amended by inserting an allegation that the check, when deposited, was credited to the plaintiff, and after its dishonor the defendant requested the plaintiff to take it up, which he did, without knowledge of the facts by reason of which all the parties to the paper had been discharged. This allegation was substituted for that in the original pleading which stated that the defendant had received the check for collection. It is urged that the court had no power to allow the amendment, and that the ruling in that respect was an error for which the judgment should be reversed. By section 723 of the present Code, the court has power at the trial to amend a pleading by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved. This power may be exercised by the court at the trial in furtherance of justice, and the statute which confers it has always received, in this court, a liberal, rather than a narrow, construction. When names were given to actions, it may be that the cause of action originally pleaded and that substituted at the trial

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would not be embraced in the same general classification, but that circumstance is not now very important. When a cause of action, however stated, is sustained by the same proof, the power of the court, under this section, to conform the statement in the pleading to the facts proved, is undoubted. It is not quite correct to say in this case that the original pleading stated a cause of action against the defendant based on negligence, while the amendment changed the action into one upon contract. In both cases the gravamen of the action was a breach on the part of the defendant of the obligation implied by law, to present the check for payment within a reasonable time. Under the complaint as originally framed, the plaintiff sought to recover the amount of the check as damages for breach by defendant of this obligation. Under the complaint as amended, he sought to recover the same sum of money on the ground that he had paid it to the bank under mistake, in that he supposed he was liable on the check as indorser, when he was not. In either form of action the essential fact to be established was the omission of the defendant to collect the check or present it for payment within a reasonable time. The plaintiff's loss and the right of recovery grew out of, and depended upon, the same facts in either case. In both cases the real scope and purpose of the action were to make the plaintiff good for the loss which he sustained in consequence of the failure of the defendant to discharge the obligation or duty which it had assumed upon the receipt of the check.

Cause of Action—
Pleading—
Amendments.

A cause of action based upon the omission of the defendant to draw out the money upon the check before the bank upon which it was drawn failed is not substantially different, within the fair meaning of the statute, from a claim to make the plaintiff good for the money paid by him to take up the same check under circumstances, then unknown to him, which deprived the defendant of the right to demand or receive it. When the claim in either form can be substantiated by the same facts, it would be a miscarriage of justice to turn the plaintiff out

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of court, after the proof was all in without objection, on the ground that he had stated his claim in one way, and proved it in another way. The power of the court to amend when such a situation is presented is ample. The failure of the defendant to present the check in time having been shown, the court could permit the plaintiff to so amend the complaint as to conform it to the facts proved, and thus end the controversy. This court and other courts have in numerous cases sustained recoveries after an amendment at the trial that worked even more radical changes in the situation than the amendment which was allowed in this case. *Thomas v. Nelson*, 69 N. Y. 118; *Reeder v. Sayre*, 70 N. Y. 180; *Insurance Co. v. Nelson*, 78 N. Y. 137; *Howard v. Johnston*, 82 N. Y. 271; *Barnett v. Meyer*, 10 Hun, 109. The leading cases cited by the defendant in support of its contention have no application, for the plain reason that the party in these cases recovered upon a cause of action or defense not pleaded, without having applied for or procured any amendment whatever. *Reed v. McConnell*, 133 N. Y. 425, 31 N. E. 22; *Freeman v. Grant*, 132 N. Y. 22, 30 N. E. 247. They have no bearing upon the question that we are now concerned with, which is the power possessed by the court to amend a pleading at the trial so as to conform to the proofs, in furtherance of justice. A party may not recover upon a cause of action not pleaded, but this case is not within that rule, since the very cause of action upon which the verdict was rendered has been pleaded, by the express order and permission of the court. What the learned counsel for the defendant complains of is not that the judgment is without a proper pleading to sustain it, but that the plaintiff was allowed to amend and insert this pleading in the record at the trial. This, we think, was within the power of the court, in the exercise of a sound discretion and in furtherance of justice; and, the exercise of that discretion having been approved by the court below upon a review of the case, the exception presents no question of law for this court.

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The other point urged in support of the appeal is that the plaintiff should have returned or tendered to the defendant the check before he could recover the money paid upon it, and that in any event the defendant was not liable for the money received until after a demand made. It would be a sufficient answer to these objections to say that no such question was raised at the trial, or even presented to the court below upon the hearing of the appeal. It is well settled that this court will not, for the purpose of reversing a judgment, entertain questions not raised or argued at the trial or upon the intermediate appeal. *Post v. Railway Co.*, 125 N. Y. 697, 26 N. E. 14; *Smith v. Smith*, 125 N. Y. 224, 26 N. E. 259; *Oliphant v. Burns*, 146 N. Y. 236, 40 N. E. 980; *Adams v. Bank*, 116 N. Y. 606, 23 N. E. 7; *Flandrow v. Hammond*, 148 N. Y. 129, 42 N. E. 511; *Quinlan v. Welch*, 141 N. Y. 159, 36 N. E. 12; *Gillies v. Improvement Co.*, 147 N. Y. 420, 42 N. E. 196; *Binsse v. Wood*, 37 N. Y. 526. These objections may, however, be very satisfactorily answered on their merits.

It is quite true that, when a party begins an action to rescind a contract or a transaction, he must first restore what he has received under it; but, if the thing received is of no value, he is not bound to return it, since the law will not insist upon the performance of an idle ceremony. *Gould v. Bank*, 86 N. Y. 81. The check in question was not of the slightest value in the hands of any one. It was not good against the drawer, since he had provided the funds to meet it, which were lost by the neglect of the defendant to present it for payment in time. It was not good against any of the indorsers, since they were discharged by the defendant's delay in presenting it. It was not good against the drawees, the Chicago banking firm, since they were not parties to it, not having accepted or certified it. Thus it will be seen that every one who was a party to the paper was discharged from all liability upon it, in consequence of the defendant's failure to present it, and hence the possession of the dis-

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honored check could be of no benefit to the defendant or anyone else. The money which the drawer had placed in the bank to meet the check passed, upon the failure of the bankers, to their assignee for the benefit of creditors generally.

It is suggested that, had the check been returned to the defendant, it might, as the holder thereof, be entitled to share in the assets of the insolvent bankers in Chicago, when distribution is made by the assignee. But the right to share in this distribution does not depend upon the possession of the check, but upon facts outside of it which may confer an equitable right upon the defendant to the dividend. The check cannot aid the defendant in that direction, since it would have to base its claim upon the facts following the issuing of the check, and the circumstance that it may be compelled to pay the judgment in this case. The defendant is in as good a position in this respect without the check as it would be with it. It does not appear whether any dividend was ever made to the creditors by the assignee of the bankers upon whom the check was drawn. The possession of the check would not confer any right upon any one to receive it if made. The record of the whole transaction upon defendant's books would be quite as useful for that purpose as the check. All this must follow from the general principle, so well settled, that a check drawn upon a bank generally does not operate as an assignment of the drawer's funds in the bank, and, unless accepted or certified by the bank, creates no obligation against the drawee. *Chapman v. White*, 6 N. Y. 412; *Lunt v. Bank*, 49 Barb. 221; *Butterworth v. Peck*, 5 Bosw. 341; *Dana v. Bank*, 13 Allen, 445; *Bullard v. Randall*, 1 Gray, 605; *Morse, Banks*, 29, 275. Since the check did not operate as an assignment of the fund in the bank or create any obligation against the bankers, and the drawer and indorsers having been discharged by the defendant's omission to draw the money upon it, the paper was of no value in the hands of any one.

Notes

Nor was any demand upon the defendant for the payment of the money necessary before this action was commenced. The defendant was not a bailee or trustee that had rightfully become possessed of the money, but a party that had consciously received what did not belong to it. The defendant received and held the money as its own, and the duty to restore it arose at the moment it was received, and existed at all times thereafter. *Sharkey v. Mansfield*, 90 N. Y. 227, 229.

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Mistake—Right
of Action—
Demand.

It is not necessary to discuss the facts. The history of the check and the delay on the part of the defendant in presenting it have already been referred to, and there was no dispute concerning these facts at the trial. The plaintiff's ignorance of the facts at the time he paid the money, constituting the mistake which entitled him to reclaim it, was clearly proved, and practically undisputed. But, even if there was any doubt or conflict on that point, the case is relieved from all difficulty in that regard by the course of the trial. Both parties requested the court to direct a verdict, and the direction for the plaintiff has conclusively settled all the facts in favor of the judgment. The record discloses no tenable ground for interfering with the judgment, and it should be affirmed, with costs. All concur, except PARKER, C. J., dissenting, and HAIGHT, J., not voting. Judgment affirmed.

NOTES.

Collections—Liability of Bank for Negligence.—A bank failing to collect a check or draft through its own negligence is liable for the amount thereof. *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25; *Bird v. Louisiana State Bank*, 93 U. S. 96; *Bank of Mobile v. Huggins*, 3 Ala. 206; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *Merchants', etc., Bank v. Stafford Bank*, 44 Conn. 565; *Georgia Nat. Bank v. Henderson*, 46 Ga. 487, 12 Am. Rep. 590; *Tyson v. State Bank*, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139; *Armington v. Gas Light, etc., Co.*, 15 La. 414, 35 Am. Dec. 59; *Fabens v. Mer-*

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cantile Bank, 23 Pick (Mass.) 330, 34 Am. Dec. 59; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; West *v.* St. Paul Nat. Bank, 54 Minn. 466; Commercial Bank *v.* Hammer, 7 How. (Miss.) 448, 40 Am. Dec. 80; Ivory *v.* Bank of State of Missouri, 36 Mo. 475; Commercial Bank of Penn. *v.* Union Bank, 11 N. Y. 203; McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; Kelley *v.* Phoenix Nat. Bank, 45 N. Y. Supp. 533; Beale *v.* Parrish, 20 N. Y. 407, 75 Am. Dec. 414; Martin *v.* Home Bank, 52 N. Y. Supp. 464; Walker *v.* Bank of the State of N. Y., 9 N. Y. 582; Montgomery Bank *v.* Albany City Bank, 7 N. Y. 459; First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Miller *v.* Gettysburg Bank, 8 Watts (Pa.), 192, 34 Am. Dec. 205; Thompson *v.* State Bank, 30 Am. Dec. 354, 3 Hill. L. (S. Car.) 77; Merchants' State Bank *v.* State Bank, 94 Wis. 444, 69 N. W. Rep. 170.

Whether Check Operates as an Assignment of Deposit.—See extensive *note*, 1 Banking Cases, 190 *et seq.*

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(*Circuit Court, S. D. Ohio, W. D., Oct. 4, 1899.*)

National Bank—Payment of Illegal Stock Assessment—Right to Reimbursement.—Where certain shareholders of a national bank pay in good faith an illegal assessment, made on account of the impairment of the stock, upon the suspension of the bank, and the payment of its debts by its receiver, such shareholders are entitled to reimbursement for the moneys paid by them under the illegal assessment, before final distribution is made to all the shareholders.

Henry M. Huggins, for receiver.

Steele & Sams, *Ben B. Nelson*, and *E. N. Huggins*, for stockholders.

THOMPSON, District Judge. This is an application by John Hulitt, receiver of the First National Bank of Hillsboro, Ohio, for instructions as to his duty in respect to the claims of certain shareholders to be reimbursed for an assessment paid by them under section 5205 of the Revised Statutes of the United States.

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On the 25th day of April, 1896, the following notice was given to the bank by the comptroller of the currency:

“Treasury Department, Office of Comptroller of the Currency.

“Washington, D. C., April 25, 1896.

“Whereas, it appears to the satisfaction of the comptroller of the currency that the capital stock of the First National Bank of Hillsboro, Ohio, has become impaired to an extent which makes necessary an assessment of fifty thousand dollars (\$50,000.00) upon the shareholders of said association to make good such deficiency: Now, therefore, notice is hereby given to said association, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its capital stock by assessment upon its shareholders, *pro rata*, for the amount of the capital stock held by each; and if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States. In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the treasury department, in the city of Washington and District of Columbia, this 25th day of April, A. D. 1896.

“[Signed]

James H. Eckels,

“[Seal.]

Comptroller of the Currency.

“To the First National Bank, Hillsboro, Ohio.”

Thereupon, on the 27th day of April, 1896, the directors adopted a resolution making the assessment. Between the 27th day of April, 1896, and the 16th day July, 1896, the shareholders, representing 545 shares of the capital stock, paid their proportion of the assessment, amounting to \$27,-250, but the other shareholders refused to pay their part thereof. On the 16th day of July, 1896, the bank, being wholly insolvent, suspended payment; and on the 22d day of July, 1896, it was placed, by the comptroller of the currency, in the hands of John Hulitt, as receiver. Afterwards,

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the receiver, under instructions from the comptroller of the currency, brought suit in this court to recover, from the non-paying shareholders, their proportion of the assessment. But the court held that the assessment should have been made by the shareholders, and not by the directors, and that the attempted assessment by the directors was therefore illegal, and dismissed the bill. Afterwards an assessment was made by the comptroller of the currency, under section 5151 of the Revised Statutes, which was paid. Ninety per cent. of the debts of the bank have since been paid, and there is money enough in the hands of the receiver to pay the remainder, leaving quite a large surplus for distribution to the shareholders. The shareholders who paid the first assessment claim to be creditors of the trust to the extent of that payment, but, under an agreement with certain of the shareholders, have waived the right to reimbursement until the general creditors of the bank are paid in full. They insist, however, as against the nonpaying shareholders, that they should be reimbursed for the moneys paid by them under that assessment, before final distribution is made to all the shareholders. They have presented their claims to the receiver, but the receiver has refused to allow them, unless instructed so to do by the court.

The comptroller of the currency advised the bank that its capital stock had been impaired to the extent of 50 per cent., and required it to assess its shareholders in that amount to restore the loss. And I think it is fair to assume that the action of the comptroller was based on knowledge of the condition of the bank (derived through the department examiners and inspectors) more thorough and complete than that of any of the shareholders, save those who were its directors and officers, and in control of the management of its affairs. And no question is made but that the paying shareholders paid the assessment in good faith, believing that the capital stock was impaired to the extent of 50 per cent.; that the assessment was legal and binding on all the shareholders; and that its payment would restore the loss,

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and save the bank. Yet, in fact, the entire capital stock had been lost, the assessment was illegal, and, within the three months allowed for its payment, the bank suspended payment, and was placed, by the comptroller of the currency, in the hands of a receiver, and the purpose for which the assessment was made wholly failed.

The assessment was illegal, but, as a matter of fact, the paying shareholders did not know that the law required it to be made by the shareholders instead of the directors, and did not know that, if paid in full, it would be wholly insufficient to restore the actual loss which the bank had sustained; and while, in view of their relation to the bank and their means of knowledge, their ignorance in these respects might not avail them as against the creditors of the bank, yet, as between them and the nonpaying shareholders, there certainly can be no application of the doctrine of voluntary payments, which will entitle the nonpaying shareholders to participate, on equal terms, with the paying shareholders, in the distribution of the fund remaining after the creditors have been paid,—a fund which was in part created by the contributions of the paying shareholders. These moneys were received by the bank to and for the use of the paying shareholders, and could not, in equity and good conscience, be retained by the bank. The paying shareholders became creditors of the bank, so far, at least, as the nonpaying shareholders are concerned.

In the case of *Winters v. Armstrong*, 37 Fed. 503, *Winters* subscribed to an increase of the capital stock of the Fidelity National Bank of Cincinnati, and paid the amount of the subscription into the bank. The increase, however, was not approved by the comptroller of the currency, and never became valid and effective. JUDGE JACKSON, at page 522, says:

“*Winters* could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by

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the pleadings appears. Subscribers may not in every case recover back deposits paid on subscribing for shares in contemplated corporations, or proposed increases of capital, where the scheme of incorporation or the proposed change proves a failure. In some cases, the right of recovery will depend on the meaning and intention of the parties as expressed in the subscription agreement. If, for instance, it appears to have been the intention or understanding of the parties that the deposit made on the subscription should be used and applied towards the furtherance or accomplishment of the scheme, and it is so applied, the subscribers may not be able to recover it upon the failure of the enterprise. When, however, such deposits are made in order to comply with some statutory requirement, and without any intention on the part of the subscribers or right on the part of the corporation to otherwise apply the same, then, upon failure of the scheme, the subscribers are entitled to have their entire deposits returned."

In *Armstrong v. Law*, 27 Wkly. Law Bul. 100, the syllabus reads as follows:

"L. borrowed money of the Fidelity National Bank on his promissory note. About the same time the stockholders of the bank, of which L. was one, resolved to increase the capital stock of the bank, and L. paid to the bank the amount of his shares of such increased capital stock. Before the bank received the necessary authority from the comptroller of the currency, under section 5142, Rev. St. U. S., for such increase of stock, and before, therefore, such increase became effective, it became insolvent, and was placed by the comptroller of the currency into the hands of a receiver, who demanded of L. payment of the note executed by him to the bank. L. claimed that the amount paid by him into the bank for the proposed increase of its capital stock was a proper set-off *pro tanto* against his note, and tendered to the receiver the difference in amount of his note and his payment on account of increase of stock. Upon refusal of such tender, L. brought suit, asking that the receiver be required to accept

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said sum, and deliver to L. his said note. Held, that the amount paid by L. on account of such proposed increase of capital stock of the bank, which had never become effective, was a proper set-off *pro tanto* against the note held against him by the bank."

In *Witters v. Sowles*, 32 Fed. 130, it is said, at page 138, that :

"The executor appears to have delivered to the bank, while its failure was impending, stocks and securities belonging to the estate, to an amount much larger than the amount of these shares, which were disposed of by the bank in payment and security of claims against it. He sets up in his answer that this was done upon an understanding that the property should be restored by the bank, if it survived, and applied on an assessment, if it failed, and one should be made. And he now claims that so much of this property or its proceeds as is necessary should be applied upon this assessment, and bar further recovery. He claims, upon the evidence, that this understanding was had, with the bank examiner as well as with the officers of the bank. This assessment is for the purpose of paying those who were creditors of the bank at the time of its failure. That property went to pay others not creditors at the time of the failure, so far as it did pay them. The delivery of the property may have created a liability of the bank. If so, the assessment upon this and the rest of the stock would go ratably upon that and the other liabilities, if proved and established."

The court refused to set off the claim of the executor against an assessment upon him, under section 5151, saying :

"The assessment never was due to the bank, and does not belong to it. The assessment belongs to the creditors of the bank, and is recoverable by the receiver, only for the purpose of ratable distribution among them."

JUDGE RANNEY, in *Ellis v. Trust Co.*, 4 Ohio St. 651, says :

"The action is brought for money had and received,

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and it lies in all cases where one has the money of another which he cannot in equity and good conscience retain. It lies, therefore, for money paid by mistake, or upon consideration which has failed; because, in such case, the plaintiff did not intend to give his money to the defendant, and the latter cannot conscientiously retain money for which he has given no equivalent."

These cases tend to support the view of the case at bar just presented.

But, in any event, upon the facts of this case, the court would hold, for the purposes of distribution among the shareholders, that the assessment attempted to be made by the directors, and which was paid by the shareholders who have been designated as the "paying shareholders," was an "assessment," within the meaning of section 3 of "An act authorizing the appointment of receivers of national banks and for other purposes," as amended March 2, 1897 (29 Stat. 600-602), which provides that when "the comptroller of the currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed," the comptroller of the currency shall call a meeting of the shareholders to decide whether the receiver or an agent to be selected by them shall thereafter wind up the affairs of the bank, and, whether wound up by the receiver or an agent, that—

"The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting, or may be subsequently received, shall be distributed as follows: First, to pay the expenses of the execution of the trust to the date of such payment; second, to repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the comptroller of the currency in accordance with the provisions of the statutes of the United States; and, third, the balance ratably among

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such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent."

When, therefore, the claims of the creditors are all satisfied, then the receiver, or an agent selected by the shareholders, will be required to distribute the remainder of the proceeds of the assets of the bank in accordance with the provisions of the statute just quoted; and I therefore instruct the receiver to allow the claims presented to him, for moneys paid under the assessment made by the directors, as claims or assessments to be paid or refunded before the final distribution to all the shareholders. I think, however, that payment of the claims of Samuel P. Scott and Joseph H. Richards should be withheld to await the final disposition of case No. 5,092, now pending in this court, wherein Charles E. Bell and others are plaintiffs, and Samuel P. Scott, Joseph H. Richards, and others are defendants, in which it is sought to recover from them the entire losses of the bank, on the ground that said losses were caused by reason of their misconduct and negligence in the management of the bank; and, should judgment be rendered against them in that case, they will be entitled to credit thereon for the amount of the payments made by them under the assessment of April 27, 1897.

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v.

CLIFTON MFG. CO.

(Supreme Court of South Carolina, July 20, 1899.)

Overdrafts by Agent—Authority of Agent—Evidence.—In an action by a bank to compel defendant to make good overdrafts by the latter's agent, to break the force and effect of its dealings with the bank during eight years, defendant offered testimony to

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prove directions to its agent which were never communicated to the bank, or to any other person than such agent, and alleged to have been communicated through a person who did not appear to have had any relation to defendant making him a proper instrument for the purpose. *Held*, that the testimony was inadmissible.

Same—Same—Same.—In such action, letters written by such agent to an officer of defendant company having authority over the agent were admissible, to prove that defendant had knowledge through the agent of overdrafts in its account with plaintiff during a certain period; as defendant's knowledge of such overdrafts seemed to be denied by the answer.

Same—Same—Same—Cross-Examination.—It was proper on cross-examination to ask defendant's witness if there was not money owing to him on account of cotton purchased by him for defendant at direction of such agent; as defendant had proved by the witness he had purchased cotton for defendant, under control of such agent, and besides, the question was preliminary to an inquiry as to a check given on plaintiff bank by such agent, to cover the very cotton account in question, which check was denied payment by the bank, being presented after defendant had denied its liability for overdrafts by the agent, but, the witness testified, was subsequently paid by defendant.

Same—Same—Amount Recoverable—Expenses.—In such action it appeared that such agent's account at the bank was frequently overdrawn, and that he did many other acts in his dealings with the bank and otherwise, on defendant's account, not strictly within the scope of his employment as an agent to buy spot cotton for spot cash; and that all such acts were ratified by defendant, until the beginning of the last cotton season, in which there were also such overdrafts and no change in the business relations between plaintiff and defendant. The first item on which the action was based was for expenses incident to the dealings between the bank and such agent. *Held*, that plaintiff was entitled to recover on account of such item.

Overdue Checks.*—Where a check is drawn at the beginning of the Christmas holidays, by an agent acting within the apparent scope of his authority, the mere fact that it has been drawn six days when presented for payment does not make it a stale check, and put the bank upon inquiry.

Checks—Agent's Authority.—Defendant not having limited, in any way, its agent's authority to draw checks upon its account with the bank, the latter was bound to honor any checks drawn on such

*See notes at end of case.

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account by the agent, unless it had knowledge that the agent was about to commit a breach of trust by drawing on the account.

Same—Same—Duty of Bank.*—If knowledge comes to a bank that an agent allowed to check upon funds of his principal on deposit with it is about to commit a breach of trust in drawing checks upon such funds, it is the duty of the bank to protect the rights of the principal: but, to acquire such knowledge, the bank is not required to exert itself beyond the channels of its business.

Same—Validity—Receipt of Benefits—Postdated Checks.—A person cannot claim the fruits or benefits of a check, which are fully equal to the amount of the check, and then repudiate the liability to pay the check; and the fact that it is a postdated check is immaterial.

Same—Frauds of Agents—Negligence of Banks—Speculative Damages.—Speculative and remote damages claimed as resulting from a bank's neglect to report the unfaithfulness of an agent authorized to draw checks upon funds deposited with it, or from its negligence in paying improper checks drawn by the agent on such funds, cannot be recovered.

Same—Authority of Agent—Duty of Bank.—Where an agent has authority to draw checks upon funds deposited in a bank for a specified purpose only, the bank has a right to assume that the proceeds of checks drawn on such funds by the agent are used for such purpose, unless it is chargeable with notice to the contrary.

APPEAL by both parties from Spartanburg county common pleas circuit court. *Modified.*

Robt. W. Shand and Munro & McCravy, for plaintiff.

Simpson & Bomar, for defendant.

POPE, J. This action was commenced on the 16th February, 1897. It came on for a hearing before his honor, JUDGE KLUGH, at the spring, 1898, term of the court of common pleas for Spartanburg county, upon the pleadings and testimony. Its issues were partly decided in favor of the plaintiff, and partly in favor of the defendant. Consequently both sides appeal from the judgment, and these appellants we now have with us. Briefly stated, the history of the action is about as follows: The plaintiff is a bank at Union. The defendant is a cotton factory in Spartanburg county, in this state. For a number of

Case Stated.

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years, beginning with the year 1888, the defendant has had T. S. Fitzsimons as its agent to deposit its moneys to the credit of the "Clifton Manufacturing Company, T. S. Fitzsimons, agent," in the plaintiff bank, for the purpose of purchasing and paying for cotton to be shipped to it from Union by its said agent. From the beginning of the business connection of plaintiff and defendant, the business of the defendant has been solely managed by T. S. Fitzsimons. He deposited all the money in the bank. He drew therefrom, by his checks, all the money so deposited. Such agent, from the very first, began a series of overdrafts in his accounts at the bank. This was acquiesced in by the bank, and was well known to the officer of the defendant who had entire charge of the agent, T. S. Fitzsimons. Sometimes these overdrafts would amount to \$23,000, \$15,000, \$12,000, and so on. The defendant, as soon as, or very soon after, the overdraft was reported to it by its agent, Fitzsimons, would cover the same by New York exchange, or very frequently by checks on the plaintiff bank drawn payable to its agent, T. S. Fitzsimons. Each year, at the close of the cotton season, the accounts between the plaintiff and defendant would be balanced, until the year 1896-1897. After January 12, 1897, the defendant learned that its trusted agent had failed to keep his business ventures from those of his principal, and thereby had diverted some thousands of dollars of his said principal's money to his speculations in cotton futures; and, in the management of the business of the defendant with the plaintiff bank, a debt of \$3,384.30 was left charged against said defendant as overdrafts. This suit is to recover that sum. But the defendant denies its liability to make good such overdrafts, and, in addition, charges that an accounting, which it demands of the plaintiff, will disclose that the plaintiff allowed the defendant's agent to use something more than \$6,750 of defendant's money deposited in the plaintiff bank in speculations in cotton futures, when such bank well knew that the defendant's agent was diverting such funds from the lawful purposes of their deposits, etc., or ought to have known such

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fact. As we before remarked, each side has appealed from JUDGE KLUGH's decree or judgment, and it remains for us to dispose of these exceptions. We will state these exceptions, beginning with those of the plaintiff, which are :

Plaintiff's exceptions : "The plaintiff excepts to the decree of his honor, JUDGE KLUGH, filed October 11, 1898, in the above entitled case, respectfully alleging error in the following particulars, all of which will be relied upon as its grounds of appeal : (1) In holding that Fitzsimons, as agent, was not authorized or empowered to draw postdated checks, and that authority to draw presentdated checks did not authorize postdated checks. (2) Having found as a fact that Fitzsimons, as agent, was authorized 'to make overdrafts, and to buy cotton on time,' his honor erred in not holding that the purchase of cotton on time, secured by means of a postdated check, was binding on his principal, and so was the postdated check. (3) In not holding that a postdated check, on and after the day of its date, was the same as a presentdated check, that a bank with funds was bound to honor it, and that an overdraft created by its payment stood upon the same footing as any other overdraft; and this whether the drawer was the principal, or an agent with authority to draw checks on his principal's account. (4) In properly finding that the Clifton Company received and used the cotton for which the seller was paid through the bank, and yet holding that defendant was not liable to plaintiff for the money which procured it. (5) In not giving plaintiff judgment for \$3,384.39."

Defendant's exceptions : "The defendant excepts to the decree of his honor, JUDGE KLUGH, filed October 11, 1898, in the above entitled case, and will ask that said decree be modified in the particulars hereafter mentioned, upon the ground, as it is respectfully submitted, that the circuit judge erred : (1) In not finding and holding that T. S. Fitzsimons never at any time bought cotton to be paid for at future times, or on credit, except during the latter part of the season of 1896, when he bought from the parties whose

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claims are now disputed by the defendant company. (2) In not finding and holding that the defendant company never at any time knew or approved of any purchase of cotton made by T. S. Fitzsimons, except cash purchases, made by cash checks drawn on its account. (3) In not finding and holding that while there were large overdrafts made by T. S. Fitzsimons on defendant company's account during the years prior to the season of 1896, which were known to defendant company, the overdrafts for the season of 1896 were not known to the defendant company, and, on the contrary, that said company was informed at the beginning of the season that the plaintiff bank would not allow such overdrafts during said season, and that the defendant instructed the said Fitzsimons, during the season, not to make any overdrafts; and, in this connection, in not sustaining defendant's exceptions to the master's report which complained against the ruling of the master in excluding letters written by W. S. Manning to T. S. Fitzsimons, dated September 16, and October 3, 1896. (4) In not finding that the officers of the bank had positive knowledge prior to the season of 1896, and during that season, that T. S. Fitzsimons had used, and was then using, the funds which he was at liberty to draw on through plaintiff's bank improperly, for his own purposes. (5) In not finding that the terms upon which the defendant company's account was intrusted to plaintiff bank, so far as T. S. Fitzsimons was concerned, were that the bank was only to pay such cash checks as Fitzsimons should draw for the purchase of cotton. (6) In not sustaining the defendant's first exception to the rulings of the master, which complained of error in admitting, against defendant's objection, letters written by T. S. Fitzsimons to A. H. Twichell from 1888 to 1897. (7) In not sustaining defendant's second exception to the report and rulings of the master, which alleged error in admitting the testimony of J. L. McWhirter as to a transaction between said McWhirter and Fitzsimons. (8) In not finding and holding that from the positive knowledge the plaintiff bank

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had of the misappropriations of the defendant's money in its charge during the seasons of 1893-94, 1895-96, 1896-97, and from its knowledge of the many suspicious acts and circumstances surrounding the manner in which Fitzsimons drew upon defendant's account during the season of 1896, it was bound, in law, to refuse to honor such checks, or to inform defendant company thereof, and, having failed to do so, plaintiff bank is not entitled to have credit for any checks drawn during the said season of 1896 which were used by Fitzsimons in so misappropriating defendant company's funds in its charge. * * * (10) In not holding that even if the plaintiff bank, during the season of 1896, did not have actual knowledge that this appellant's agent intended to misappropriate large sums of money he then drew from it by checks, the knowledge that the bank did have of the said agent's action, which was shown by the undisputed evidence, was sufficient to put a reasonable man upon inquiry as to the intention of the said agent, and that the failure of the bank to take such steps as were necessary to prevent such misappropriations, and its continued payment of checks intended therefor, were, in law, a breach of trust on its part, and for this reason the plaintiff bank should not be allowed credit, in its accounting with the defendant, for any checks by and through which such misappropriations were made. (11) In not holding that so far as the defense which the defendant sets up in this action is concerned, by which it seeks to have an accounting with the plaintiff, and asks judgment on its counterclaim, it is equitable in its nature, and, so considering the issues raised, in not holding that the plaintiff is liable to the defendant for the full amount alleged to be due on said claim. (12) In holding that there was nothing to put the plaintiff bank upon inquiry as to the various checks drawn by Fitzsimons intended to misappropriate the defendant's funds, and that the said checks were, and should be considered, valid, in the accounting between the plaintiff and defendant. (13) In not holding that the check for \$930 drawn by Fitzsimons in favor of Nicholson & Son on December 24, 1896, and not

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paid until the 30th of December, 1896, was, under the circumstances, and when paid, in law, a stale check,—one that defendant company could not have been held liable on,—and that plaintiff was not entitled to credit for the sum paid out for said check. (14) In not holding that the plaintiff should not be allowed to recover for the said check of \$930 for the further reason that it was paid, when stale, to a party who knew, or had strong reasons to know, of the misappropriation of defendant's funds, and that the plaintiff bank, in paying it off, took the said check subject to all the defenses defendant company had against the same. (15) In not holding that the plaintiff bank should not be allowed to recover for the said \$930 check for the further reason that, if the bank had not previously known of the conduct of T. S. Fitzsimons, it had knowledge when it paid the said check of such circumstances as should have prevented such payment. (16) In holding that it would be against good conscience for a cotton mill to procure cotton through the unauthorized act of its agent, then repudiate the act of its agent, and refuse to pay the owner, and yet retain the cotton, when no such question arose, or was presented for decision, under the facts of this case, and in not holding that, even in an action such as that proposed, a purchaser of cotton can in no case be held liable for an unauthorized act of its agent, unless such act has been ratified, and that the facts and circumstances of this case do not show any such conduct on the part of the defendant company as would, even in the case supposed by the circuit judge, amount to such ratification, and make the defendant company liable. (17) In not ruling and holding that the plaintiff should not have judgment against the defendant for any sum whatsoever, but that the defendant should have judgment against the plaintiff on its counterclaim for \$6,700. (18) In not ruling and holding that even if plaintiff is entitled to a judgment against defendant for \$1,085.16, such sum should not bear interest, and in allowing plaintiff interest thereon."

In our disposal of the questions raised, we will con-

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sider those exceptions relating to the competency of certain testimony.

The defendant complains that it was not permitted to prove its directions communicated through W. S. Manning's letters to T. S. Fitzsimons, dated, respectively, September 16, and October 3, 1896, when such directions were never communi-

Overdrafts by
Agent—Author-
ity of Agent—
Evidence.

cated to the plaintiff. The effort of the defendant by this proffered testimony was to break the force and effect of its dealings with the plaintiff for eight years by proving directions to its agent which were never communicated to the bank, or any other person than its agent, Fitzsimons. This testimony was objectionable from two standpoints: It does not appear that W. S. Manning had any relation to the defendant which would warrant any directions being communicated through him to the agent, Fitzsimons. Again, there was no relevancy in any testimony purporting to give directions by the defendant to its agent, unless such directions reached the plaintiff. There is no error here.

The defendant also complains, its sixth exception, that it was error to admit in evidence all letters written by T. S. Fitzsimons to A. H. Twichell from the year 1888 to January 12, 1897. Mr. Twichell was the officer of the

Same—Same—
Same.

defendant who controlled for it the agent, Mr. Fitzsimons. In the answer of the defendant there was a clause which seemed to negative all knowledge by the defendant of overdrafts in its account with the plaintiff bank controlled by its agent, Fitzsimons. It became important to show that the defendant, from the very first year of its business with the plaintiff bank, had knowledge, derived from its agent, Fitzsimons, of overdrafts frequent in occurrence and of considerable magnitude; that such agent, in one of such letters, had reported to the defendant that Mr. Wallace, as president of plaintiff bank, had said in 1890 that, as long as money was so tight as it was at that time, overdrafts would not be permitted, and that, notwithstanding such letter, such overdrafts did continue. Besides, it comes with ill

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grace from the defendant to complain of the admission of these letters in testimony, when it relies upon one of such letters, written to Twichell by Fitzsimons in September or October, 1896, wherein it was stated that Mr. Farr, as president of plaintiff bank, would not permit overdrafts, to sustain the proposition that overdrafts were not to be allowed during that year. We think the letters are competent. The exception is overruled.

Lastly, on this branch of the case, occurs the seventh exception, which complains that it was error to allow the testimony of J. L. McWhirter as to a transaction between said McWhirter and T. S. Fitzsimons. McWhirter was defendant's witness, and while examined in chief the witness had testified that he bought cotton for the defendant's mill in the season of 1896-97, and that Mr. Fitzsimons sent the money to him with which to pay for cotton, or placed such money to his (McWhirter's) credit in plaintiff bank, and that the amount received from Mr. Fitzsimons up to 2d November, 1896, was \$5,786.53. On the cross-examination, plaintiff asked the witness if in January, 1897, there was not money owing to him on account of cotton purchased for the Clifton Mills at direction of Mr. Fitzsimons, their agent. This testimony was objected to. We think the testimony was competent, for the defendant had led the way to such testimony by its examination of this witness, proving that he purchased cotton for defendant, under control of Fitzsimons. Besides, the question was preliminary to the inquiry as to the check given on plaintiff bank by defendant's agent, Fitzsimons, to cover the very cotton account in question, which check was denied payment by the bank, being presented after 14th January, 1897, but which check, the witness testified, was afterwards paid by the defendant mill. The exception is overruled.

Same—Same—
Same—Cross—
Examination.

We will now pass upon the questions underlying the remaining exceptions,—those of plaintiff and of defendant:

In the brief history of the action we stated that the judgment or decree of the circuit judge was partially in favor of

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the plaintiff and partially in favor of the defendant. By this language we meant to say that the plaintiff was only allowed judgment for \$1,085, and interest thereupon from 14th January, 1897, and that the defendant was not allowed judgment for its counterclaim of \$6,750, but its objection to the sum of \$2,799.23, for which plaintiff claimed judgment, was sustained. The suit of plaintiff was really based upon three items, *viz.*: One for expenses which aggregated \$154.59, another for a check paid to William A. Nicholson & Son for \$930.57, and another for the sum paid on the check of defendant in favor of R. W. Harris for \$2,299.23. The circuit judge, speaking of the first item (that for \$154.59) says, "To the first item there appears to be no objection." But, in the seventeenth exception of defendant, we understand that he includes this item of \$154.59 in his objection, so that we must pass upon this, as well as the other two items. Underlying those three items and the counterclaim of \$6,700 proffered by the defendant, a very interesting discussion has arisen. In the first place, defendant would insist that plaintiff should be allowed no claims against it arising out of any overdrafts in its account with the plaintiff bank, because notice was given by the plaintiff to the agent of defendant that such defendant would be allowed no overdrafts during the season of 1896-97. This contention of defendant is based upon the declaration of such fact by T. S. Fitzsimons in his letter to A. H. Twichell. Mr. Fitzsimons, in his testimony, declares that Capt. Farr, as the president of the plaintiff bank, so declared to him at the beginning of the cotton season in 1896-97, and that he (the witness) apprised Mr. A. H. Twichell, as treasurer of defendant's mill, of that fact. That this is not true, reference has but to be made to the testimony of the president and cashier of the plaintiff bank, and the further fact that overdrafts were obtained after September, 1896, till the close of the business of defendant with plaintiff, which overdrafts were the direct work of the hands of said Fitzsimons.

Same—Same—
Amount
Recoverable—
Expenses.

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Again, it is urged by the defendant that the very method by which business relations were begun by the defendant with the plaintiff shows that its account with the bank looked to the purchase of spot cotton by its agents from its funds on deposit in the bank, and it now states that, while it had knowledge of overdrafts, yet such were not by the direction and authority of defendant. When the defendant opened business with plaintiff, the following letters were written:

Exhibit A: "The Clifton Manufacturing Co. Cotton Mills. Clifton, S. C., September 25th, 1888. E. R. Wallace, Esq., President, Union, S. C.—Dear Sir: I inclose for deposit check on Park Bank, \$10,000. Mr. Theo. S. Fitzsimons will be our cotton buyer in your market, & will draw against our acct. for his purchases. We open the acct. in our name, instead of his, as I may wish to buy cotton independent of him. * * * Yours, truly, A. H. Twichell, Treasurer."

Exhibit B: "The Clifton Manufacturing Co. Cotton Mills. Clifton, S. C., September 28th, 1888. E. R. Wallace, Esq., President, Union, S. C.—Dear Sir: Yours received. The plan you propose, for keeping two accounts with you, is exactly the same as I do at Spartanburg, but I thought it might be more trouble to you. I will keep an account distinct from Mr. Fitzsimons' cotton account, and will send him checks on our account for deposit on his cotton account. Yours, truly, A. H. Twichell, Treasurer.

"Clifton Manufacturing Co. A. H. Twichell, Treasurer.

"Clifton Manufacturing Co. T. S. Fitzsimons, Cotton Account."

The same arrangement was continued for the cotton season of 1889-90, 1890-91, 1891-92, 1892-93, 1893-94, 1894-95, 1895-96, 1896-97. In the "case" copies of the account between plaintiff and defendant for each of these years appear. An inspection of such accounts shows that each and every year from 1888 through 1897 (12th January) overdrafts were the rule. Letters from Mr. Fitzsimons to Mr. Twichell show that the latter was apprised of those overdrafts,—so much so that Mr. Fitzsimons felt called upon

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on 22d November, 1890, to apprise his principal that the arrangement of overdrafts would have to be suspended "while the squeeze in the money market lasted." His exact language in this letter to Mr. Twichell is: "Mr. Wallace [president of the bank] said to tell you that he could not carry overdrafts now, while the squeeze in the money market lasted." The circuit judge found as a fact "that his [Fitzsimons'] account at the bank was very frequently overdrawn, and often in large amounts, continuing and increasing for several days at a time, and that he did many other acts not strictly within the scope of his employment as an agent to buy spot cotton for spot cash. His employers did not disapprove of these acts and dispositions of his, but they, rather, by their recognition, acquiescence, and the acceptance of the result, ratified and authorized them. The overdrafts on the bank account, as often as they occurred, were covered by the Clifton Company; and the bank, while at times objecting to them, even to the extent, in two or three instances, of refusing to pay them, still allowed them, and they became one of the commonest features of the course of dealings between the two corporations." From all these matters we are inclined to hold, with the circuit judge, that overdrafts at the bank were the rule with this agent, whose conduct, except in the year 1896-97, was known by the defendant, and ratified by it. But, in this connection, the defendant insists that although, up to the beginning of the last cotton season, to wit, that of 1896-97, the conduct of its agent as to overdrafts may have been known and ratified by it, yet that when the president of the plaintiff bank communicated through the agent, Fitzsimons, to the defendant company, that overdrafts would not be permitted during the cotton season of 1896-97, a new relation was established between the two corporations, by which new relation "spot cotton for spot cash" was to obtain. As we have heretofore remarked, this is not in accordance with the testimony of the plaintiff's witness who was its officer. They deny that any such direction was given, and they point to the fact that this very agent,

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Fitzsimons, carried on the old habit of overdrafts as much in 1896-97 as he had done in the past eight cotton seasons. We must agree with the circuit judge that so far as the first item, of \$155, is concerned, the defendant is liable to pay this item.

We will next examine the \$330 check drawn by the defendant through its agent, Fitzsimons, payable to William A. Nicholson & Son. Of course, so far as this (the second) item in the overdraft is affected by the preceding Overdue Checks. objections, we declare it also free from objection.

But it is claimed that it was a stale check, because it was drawn on the 24th, and only paid on the 30th, of December, 1896. We must confess our surprise that the lapse of a few days during the Christmas holidays,—say, six days,—from the date of check to its payment, should be construed as rendering such a check a stale check. The decree of the circuit judge on this point is in these words: “The second item, of \$330.57, has the following history: One Pagan was Fitzsimons’ subagent for buying cotton at Shelton. He drew on Fitzsimons for \$1,100, to pay for some thirty-odd bales of cotton. The draft was made through the bank of Nicholson & Son. In payment of the draft, Fitzsimons gave the check for \$330.57, dated December 24, 1896. There seems to have been some question as to the plaintiff bank paying this check, but it was paid on December 30, 1896. The cotton so paid for was not shipped to Clifton, but to Pacolet. Here every circumstance of the transaction shows it to have been within the limits of the agent’s authority, except that the cotton was not shipped to Clifton. This last circumstance was not known to the bank, and could not have been discovered except by extraordinary inquiry. The defendant argues that, the check having been drawn on the 24th, and not paid until 30th, made it a stale check, and that the bank was especially put upon inquiry by that fact. If a check six days old is ever to be regarded as stale,—and there may be cases which would make it so (see 2 Morse, Banks, pp. 441, 443),—the facts in regard to the one in ques-

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tion do not bring it within that class. It was drawn on Christmas Eve, at the beginning of the season when business is suspended for a greater or less period everywhere, and this circumstance alone might well excuse the brief delay in payment. But it appears that there was some hesitation on the part of the bank, for the reason that the president did not like to allow overdrafts, and this led to an interview between him and Fitzsimons in reference to this very check. Doubtless, the facts in regard to the transaction were then as fully made known by Fitzsimons as they could have been discovered by the most thorough and searching inquiry by the bank, and they seem to have satisfied the president of the bank, for the check was paid. The cotton seems to have been shipped from Shelton, and not from Union; and the fact that it was or was not received at Clifton could not have been the subject of inquiry to the bank, unless it was satisfied that Fitzsimons was absolutely untrustworthy. I think the defendant is bound to pay this check.' We are quite satisfied with the conclusion reached by the circuit judge as to this second item.

We will now examine this third item, to wit, the check drawn by Mr. Fitzsimons, in the name of the defendant mills, on the plaintiff bank, in favor of R. W. Harris, for the sum of \$2,299.23. It is the check which has called forth the best powers of the attorneys on each side of this controversy. It is suggested by the appellant, plaintiff, that the circuit judge, having found, as facts to control in this case, that the matter of overdrafts in his accounts with the plaintiff bank was well known by the defendant to be the habit of its agent, T. S. Fitzsimons, and that the defendant always ratified such overdrafts, by time after time paying them up without one word of dissent thereto by the defendant to the plaintiff, and also that the check to R. W. Harris was given for cotton purchased by the said Fitzsimons for the defendant, and that such said cotton was shipped to, received by, and used by the defendant mills, ought to have gone forward

Checks—Agent's
Authority.

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and found the defendant liable to pay this check. The defendant suggested to the court that the plaintiff bank had knowledge of enough facts in the business life of the defendant's agent, Fitzsimons, to have put said plaintiff bank on strict inquiry, so that it would not have paid this check drawn in an irregular way; and, further, it suggested that the plaintiff had no right to pay a postdated check and charge the same to the account of the defendant mills. It is always well to remember, when it is charged that a duty is owed by one to another, for the breach of which duty a legal liability may be said to exist, how the duty is said to have originated. In this connection it is suggested that by the letters of Mr. A. H. Twichell, dated September, 1888, addressed to the president of this bank, Mr. T. S. Fitzsimons is brought to the bank's attention as the trusted agent of the defendant mills, and that from the last days of September, 1888, up to 13th January, 1899, not one word and not one act intimated that the defendant doubted the entire trustworthiness of their agent. The defendant placed on deposit to the account he managed for the defendant originally, and at no other time during the business relations of plaintiff and defendant was there any restriction placed upon the power of this agent to draw those funds. No such restriction having been made, as suggested by the defendant, upon the power of its agent to draw checks upon said account, unless the bank had positive knowledge that a fraud such as a breach of trust was being attempted by the agent, the bank was bound to honor any checks he might draw. *Knobeloch v. Bank*, 43 S. C. 233, 21 S. E. 13; *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 19 S. E. 502; *Fogarties v. Bank*, 12 Rich. Law, 518. Furthermore, it must be remembered that no bank is made to exercise supervisory functions over its depositors. If knowledge comes to the bank that any agent who is allowed to check upon the funds of his principal on deposit with it is about to commit a breach of trust in drawing checks upon the fund in bank, of course,

Same—Same—
Duty of Bank.

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in such an event, it would be the duty of the bank to protect the rights of the principal; but, to acquire this knowledge, such bank will not be required to exert itself beyond the channels of its business. To hold a bank to a higher duty than that of being bound within the channels of its business in acquiring information of any projected breach of trust by an agent who has the power to check all the funds of the principal from the bank, would imperil the banking interests of the country. In the case at bar, as far as the testimony went was that in the year 1893 the bank had heard of a loss to Fitzsimons in a cotton speculation, which loss was made up by the assistance of some of his relatives. So far as Fitzsimons' conduct in the year 1896-97 was concerned, prior to 13th January, 1897, there was no testimony which brought home any knowledge to the bank officials of anything in the conduct of defendant's business by Fitzsimons which would necessarily or even likely attract attention to any wrongdoing on his part. The testimony showed that he had been in the habit of having subagents to buy cotton both at Union and at Santee, in that county, and at Jonesville, in that county; and it was his habit, in supplying McWhirter, his agent at Jonesville, with funds, to deposit money to McWhirter's credit in the plaintiff bank, or to draw money and send it by express, or even carry it to Jonesville for him. It was from Jonesville that he (Fitzsimons) secretly, in the name of another innocent young man, sent the money he drew, ostensibly for McWhirter, to persons in New York, to pay on cotton-future speculation. We agree with the circuit judge that there was nothing in all these matters to justify the defendant's position as to guilty knowledge by the bank. Then we come to consider the matter of the check being postdated. Now, in connection with the postdating of the check payable to R. W. Harris for \$2,299.37, it is important to always remember that the cotton which was covered by this very check was actually received and used by the defendant's mills. So that it is not the case

Same—Validity—
Receipt of Bene-
fits—Postdated
Checks.

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of a postdated check enabling the agent of defendant to swindle his principal out of the thing which was procured by the postdated check. After all, what is a postdated check? It is one which is knowingly dated in the future, and is thus distinguished from a check drawn on the day it is given. If there is money on deposit when it is presented, it must be paid. In this instance the defendant, through its trusted agent, in order to purchase a lot of cotton from R. W. Harris, with the consent of the bank, gave said Harris a postdated check, to be used or cashed on the 12th January, 1897. Under this postdated check the defendant received the cotton whose purchase price was set out in said check. Now, can a person claim the fruits or benefits of a check, which are fully equal to the figure named in the check, and then repudiate the liability to pay such check? *Townes v. City Council of Augusta*, 46 S. C. 15, 23 S. E. 984. The money which the agent of the defendant appropriated to his own purposes had been taken some time before this lot of cotton was bought from R. W. Harris. The postdated check has no earthly connection with such misappropriation. So that we think the circuit judge erred when he refused to hold the defendant mill responsible to the plaintiff for this sum of \$2,299.37.

It remains now to dispose of the claim of defendant that, in equity and good conscience, the plaintiff bank should make up to the defendant the \$6,700 it claims to have lost for and on account of said bank's remissness in allowing the defendant's agent to check out from the bank \$6,700, which was checked out for the purpose of, and actually used by the said Fitzsimons in, his own ventures, to wit, the purchase of cotton futures in the city of New York. This is set up by defendant as a counterclaim, and in disposing of it the circuit judge uses this language: "A counterclaim is set up by the defendant against the plaintiff for the amount of defendant's funds that were misappropriated by Fitzsimons. It is not disputed that large sums of the company's money were

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drawn from the bank and misapplied by Fitzsimons in the fall of 1896, and the company suffered loss thereby to the extent of several thousand dollars; but it is not pretended that the bank received any benefit, either direct or indirect, from his dishonesty, not that there was any positive bad faith on its part towards the Clifton Company in allowing him to draw the money. It is not even claimed that the bank, or any of its officers, actually knew that any part of this money was being misapplied. The contention is that the bank, through its officers, knew that Fitzsimons speculated in former years, and knew, or had reason to suspect, that he wrongfully used his employer's money; that it negligently and wrongfully failed to communicate this information to the Clifton Company; also, that it knew, or had reason to suspect, that he was pursuing the same improper practice in 1896, and neglected to impart its knowledge or suspicions to the said company, as it was its duty to do; that Fitzsimons was only authorized to draw checks for the purchase of cotton for cash, and all other checks drawn by him were unauthorized, and not binding on the company; that the defendant is entitled to an accounting with the plaintiff, upon which all checks so improperly drawn must be excluded, and to an investigation of plaintiff's neglect of duty as alleged, and to have judgment against the plaintiff for such amount as was thus negligently paid out, and lost to the company. It is not quite clear whether the cause of action relied on in the counterclaim lies in tort, for damage resulting from the plaintiff's alleged negligence,—the measure of damage being the amount of defendant's funds misapplied and lost by Fitzsimons,—or in contract, for the balance on the account which would appear in the defendant's favor if all checks drawn by Fitzsimons for other purposes than the legitimate use in his employment as the Clifton Company's cotton buyer were eliminated. If it be considered to be for the alleged tort, then the claim would be stated thus: That the defendant deposited money with the plaintiff, to be drawn out by its agent for a sole,

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express purpose; that it was the plaintiff's duty to see that no part of said money was drawn out for any other purpose, or misapplied when properly drawn out; that plaintiff neglected to perform its duty in that regard, and, in consequence, damage to the defendant ensued. Any damages claimed as resulting from plaintiff's neglect to report the agent's unfaithfulness, or from negligently paying improper checks in prior years to 1896, are manifestly both speculative and remote. It would be pure conjecture to surmise as to what the Clifton

Same—Frauds
of Agents—Neg-
ligence of Banks
—Speculative
Damages.

Company would have done, had the bank reported that Fitzsimons in 1893, for instance, was, or that it suspected from certain circumstances that he was, speculating, or that it believed that he was drawing out money for other purposes than the purchase of cotton. If, upon such information, the company would have investigated for itself, and, on finding the bank's suspicions well founded, have discharged him and never employed him again, then the loss of 1896 would, of course, not have occurred. But it is impossible to say the company would have done this. Mr. Twichell, the treasurer of the company, who had the entire control of Fitzsimons as its cotton buyer, testifies that, if he had known in 1896 that Fitzsimons was drawing postdated checks, he would have sent for him, and put a stop to it. It is not unfair to assume that had he known of any other unauthorized drafts on the company's funds, either in 1896 or any prior year, no loss having up to that time ensued, and Fitzsimons being regarded as a valuable and trustworthy servant, he would have treated the matter in the same way,—simply have put a stop to it by forbidding it,—and the agent would still have been held in a position to resort to other methods of abusing his trust. Again, no loss ensued in former years from the company's ignorance of its agent's unfaithfulness, nor from the bank's negligence in paying improper checks, and therefore no damage could be predicated thereon. The transactions prior to 1896 can therefore give no support to this counterclaim, viewed as an action for a tort. Neither, indeed,

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can they if it is regarded as a claim for the balance due upon the account ; for the account was balanced each year, and no loss appears until the years 1896 and 1897. The transactions of these five years are instructive, however, as showing the true relations between the several parties,—the Clifton Company, Fitzsimons as its agent, and the bank. Granting, then, that the duty of the bank was, at the beginning, as claimed by the defendant, to pay out the company's money only on its agent's checks for the immediate payment of cotton bought at the instant of drawing each respective check, then it must be also granted that the agent's authority was equally narrow, and that if his authority was broadened, or the stringency of his instructions were relaxed, by the company, either expressly or by implication, then the bank not only had the right to, but must necessarily, correspondingly relax the tension of its duty, if it was to still serve the purpose for which the Clifton Company had chosen to use it. Thus, if the company allowed its agent, instead of rigidly paying spot cash for cotton, and ceasing to buy the moment he drew the last dollar out of the bank, to exceed these limits by overdrawing the account for the purchase of cotton, the bank had the right to assume that the company would be responsible for the overdraft. If the agent was allowed to employ subagents at the different stations along the railroad to buy cotton, the bank had the right to assume that the money drawn out by him to supply these subagents was properly drawn, and it had authority to pay the checks for this purpose. Now, that these and similar practices became a part of the established course of dealing between the parties is clearly shown by the testimony. When such becomes the case, the bank had the right to assume that it would continue, especially as the Clifton Company for several years, and, so far as appears to the contrary, every year, reopened its account with the bank expressly on the same terms as the last year. The defendant does not make good its claim, then, that the bank had authority only to honor Fitzsimons' check

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to pay for cotton bought on the spot. Neither can the position be sustained that the bank was bound to see that no part of the defendant's funds was misapplied by its agent. In the first place, he was introduced to the bank as an honest, trusted agent of the defendant; and by its conduct, as we have seen, he was held out as having large latitude in the management of the business confided to him. The bank had the right to presume, then, that any check drawn, any act done, or statement made by him in the apparent ordinary course of his employment was in good faith, and authorized by his principal, and only actual knowledge of strong evidence to the contrary would have warranted the opposite conclusion by it. It is not claimed that the bank had actual knowledge that Fitzsimons was misapplying the Clifton Company's money during the fall of 1896. The only suspicious circumstance which appears to have arrested the attention of any officer of the bank that season was a draft for \$200 on New York, which was procured during the month of November from the cashier; and that officer testifies that the thought occurred to him, from the fact of its being a round sum, that it was for cotton futures. He knew that Fitzsimons' salary was \$1,200, and he might well have concluded that the check, though drawn on the Clifton Company's account, was Fitzsimons' own money. Besides, it seems that Fitzsimons did sometimes draw checks for New York exchange in the course of his employment as the Clifton Company's agent. This one incident was not sufficient to put the bank on notice that Fitzsimons was making an improper use of his employer's money. Again, there is no proof that the bank was bound to inquire into the purposes for which Mr. Fitzsimons used the Clifton Company's money, or that its obligation was different from that ordinarily assumed by banks in receiving on deposit under similar circumstances. To say that it was the duty to inquire into the specific application of the proceeds of each check drawn by this agent would be

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to impose upon it an intolerable burden, which would soon drive it out of business. Of course, it could have bound itself by a specific agreement to do this, but there is no proof of any such agreement.

Same—Authority of Agent—Duty of Bank.

For gross carelessness or participation in the agent's fraud, the company would have the right to hold the bank liable, but the testimony gives no support to a contention like this. I conclude that the evidence does not sustain the counterclaim on the ground of the plaintiff's negligence. Can it be sustained on the ground that there is a balance due the defendant on the account? The Clifton Manufacturing Company deposited its money with the bank in accordance with a long-established course of dealing between the two, to be drawn out by its agent for purposes defined by a long course of employment, from which, together with the company's express instructions, the bank was informed of the agent's authority. Checks drawn by the agent within the scope of his authority were valid, and the bank had the right to assume that all checks drawn by him were authorized, unless it knew, or had strong reason to believe, the contrary. If it paid any checks that it knew, or had good reason to know, or ought to have known, were drawn in excess or in violation of the agent's instructions, the said payments were not binding on the defendant, and are not proper credits in favor of the bank against the depositors. Now, the funds of the company that were drawn by Fitzsimons and sent to New York or elsewhere for the cotton speculation in the fall of 1896 were principally, if not entirely, drawn out from the bank by means of the checks in favor of McWhirter, or other sub-agents, and those in favor of Nicholson & Son. We have seen that these were all apparently of the same character as checks formerly drawn by him and approved by the Clifton Company, and there was nothing to indicate to the bank that they were unauthorized. We are bound, therefore, to conclude that, so far as the bank was concerned, they were valid checks, and proper credits in its favor on the account. The counterclaim must, then, be disallowed." Thus has the

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circuit judge disposed of this so-called equitable counterclaim. We agree most heartily in the conclusion reached by him in this matter. We do not know that we can add anything to the reasoning employed by the circuit judge in coming to his conclusion. However, we cannot resist the inclination to say that with all these findings by the circuit judge, along with others in the decree, it is difficult for us to see how the circuit judge failed to sustain claim to the Harris check for \$2,299.37.

Before closing the opinion, we may remark that we have not passed upon the claim of one side that this is an action on the law side of the court of common pleas, and of the other side that it is an action on the equity side of that court; for it seems of no consequence whether it is law or equity. All the findings of fact in the circuit decree are in favor of the plaintiff. The plaintiff only claims that a few of the conclusions of law of the circuit judge are erroneous. This court could only, in that case, review errors of law set up by the appeal. If, however, it is an action on the equity side, then this court is fully empowered to review alleged errors of law and fact; and we are satisfied with all such findings of fact. Thus, it appears that it is immaterial whether the action is in law or equity.

Having disposed of all the issues herein involved (although we have not specified each exception to which our views applied, yet we have considered each one), as the result of our labors we have sustained the exceptions of the plaintiff, and overruled each exception of the defendant, and our reasons therefor are mainly stated herein. We use the words "mainly stated," so as to let it be known that some reasons are necessarily implied from those expressed.

It is the judgment of this court that the judgment of the circuit court be so modified that the plaintiff shall be allowed judgment against the defendant for the sum of \$3,384.39, with interest from the 12th day of January, 1897, instead of the sum of \$1,085.16, with interest thereon from 12th January,

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1897, up to the date of the decree of circuit judge, which, as stated by him, was \$1,218. Let the action be remanded to the circuit court.

NOTES.

Checks—When Overdue.—It cannot be laid down as matter of law that any certain lapse of time between the date of a check and its presentment will make it a stale or overdue check; as it is a question which depends upon circumstances. *Brown v. Olmsted*, 50 Cal. 162; *Howes v. Austin*, 35 Ill. 396; *Smith v. Jones*, 2 Bush. (Ky.), 103; *Lester v. Given*, 8 Bush. (Ky.), 357; *First Nat. Bank of Rochester v. Harris*, 108 Mass. 514; *Stephens v. McNeill*, 26 Barb. (N. Y.), 651.

Sufficient Delay to Put Payee upon Inquiry.—"The retention of a check by the holder for a considerable time, without presentment, where no defense exists to it, is unusual, and this circumstance is sufficient to put a party taking it upon inquiry, and a check dated * * * several months before its transfer, and which might have been presented at or soon after its date, will, in the absence of explanation, be treated as overdue and dishonored, whether it has been actually presented or not, so as to let in defenses existing between the drawer and payee. *Gongh v. Staats*, 13 Wend. 549; *Little v. The Phenix Bank*, 2 Hill, 425; *Down v. Halling*, 4 B. & C. 330; *Daniels on Neg. Instruments*, § 1633; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70." See also *Newton First Nat. Bank v. Need*, 29 Iowa 249; *Vairin v. Hobson*, 8 La. 55; *Skillman v. Titus*, 32 N. J. L. 96; *Herricks v. Woolverton*, 41 N. Y. 581; *Lancaster Bank v. Woodward*, 18 Pa. St. 357, 57 Am. Dec. 618; *Weathere v. Smith*, 9 Tex. 622; *Morey v. Wakefield*, 41 Vt. 24; *Brooks v. Mitchell*, 9 M. & W. (Eng.) 15.

Relation between Bank and General Depositor.—The relation between the bank and a general depositor is not that of agent and principal, or of trustee and *cestui que trust*, but is merely that of debtor and creditor. See *note, ante* 95 *et seq.*

Checks on Local Banks—Presentment.—See *Morris v. Eufaula Nat. Bank*, 1 Banking Cases 677, and *note*, 687.

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DINGLEY

v.

MCDONALD *et al.**(Supreme Court of California, March 24, 1899.)*

Depositor's Check Given for Bank's Draft—Protest of Draft—Payment of Checks.*—A depositor gave his check for the bank's draft payable to another party, and the check was charged against him; but the draft was protested and returned to the bank. *Held*, that there was no payment of the check which could withdraw from the amount of the deposit.

Insolvent Bank — Stockholders' Liability — Evidence.—A claim showing the state of the depositor's account with the bank, signed by its manager, and delivered to the depositor in place of his bank book, after the bank's insolvency, but while it was under the control and management of its directors, was competent evidence in an action to enforce the stockholders' liability; and was not subject to objection as a mere declaration of officers after insolvency, as it was merely a restatement of what the bank book, which was in evidence, showed.

Cause of Action—Verbal Assignment.—An assignment of a cause of action by the representative of another need not be in writing.

Limitations.—A statute of California provides that such actions shall be brought within three years "after the liability was created." *Held*, that the day on which a deposit in such bank was made should be excluded in determining whether an action to enforce the liability of the bank's stockholders on account of such deposit was barred by the statute.

APPEAL by defendant from San Francisco city and county superior court. *Affirmed.*

Sawyer & Burnett, for appellant.

H. A. Powell and *W. A. Dow*, for respondent.

PRINGLE, C. This action is brought against stockholders

*See notes at end of case.

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of the Pacific Bank to recover the portions of the debts of the bank for which they are respectively liable as stockholders. Many claims are consolidated. But only in the case of two claims are questions presented on this appeal.

Case Stated. 1. The complaint alleges: That on the 23d day of June, 1893, there was on deposit in said bank, belonging to and to the credit of H. D. Rowe, the assignor of the plaintiff, the sum of \$4,891.01; that on the said 23d day of June the bank closed its doors, and suspended business. The answer denies that on the 23d day of June there was on deposit to the credit of Rowe any more than \$228.25. The court finds that there was on deposit as alleged in the complaint the sum of \$4,891.01. Appellant claims that the evidence is insufficient to justify the finding. The evidence shows that Rowe had that amount—\$4,891.01—on deposit on the 17th of June; that on that day and on the 21st of June he drew two checks for drafts or bills of exchange by the Pacific Bank on the National Bank of Illinois at Chicago in favor of Charles A. Capwell. These checks were charged against his account, and reduced the account on the books to \$228.25, the balance shown by his bank book on June 22d. The checks were not paid in money, but were given for the drafts. The drafts were refused payment, were protested, and returned to Rowe, and by him surrendered to the Pacific Bank. The bank gave him credit on his bank book for the amount of the checks which it had charged against him, restoring his credit account to \$4,891.01. This credit was not entered on the bank book until December 14, 1893. The appellant claims that by the issuance of the drafts payable to Capwell the bank assumed a liability to him different to its liability to Rowe for his original moneys on deposit; and that, whatever may be its liability on the drafts, it was not for moneys on deposit, as charged in the complaint. But that is not of the substance of the transaction as between the bank and Rowe. Rowe had moneys on deposit with the bank. He instructed the bank to pay his moneys to Capwell in Chicago, and drew

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a check to appropriate moneys for such payment. The bank, by its draft upon Chicago, ordered payment to be made to Capwell; but the bank failed, payment was not made to Capwell, and the draft was protested, and returned to the bank. This is the meaning of the transaction between Rowe and the bank, consisting of check and of draft protested and returned. There was no payment of the check which could withdraw Rowe's deposit. The draft was not received in payment of the check. It is well settled that a note, even if it be the note of a third person, or a bill of exchange in favor of another, does not operate as payment except by express agreement. The presumption is not in favor of its being received as payment. *Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15, 20 Pac. 28 (in which it was said that, when a check is given for payment of a debt, the giving of a receipt in full does not establish an agreement for an absolute payment); *Steinhart v. Bank*, 94 Cal. 362, 29 Pac. 717 (in which the original note was stamped as "canceled"); *Society v. Burnett*, 106 Cal. 516, 39 Pac. 922 (where the old obligation was surrendered).

Depositor's Check
Given for Bank's
Draft—Protest of
Draft—Payment
of Checks.

Appellant claims that it was error to admit in evidence the "claim" delivered by the bank to Rowe in the place of the bank book surrendered by him. The claim is as follows : "\$4,891.01 No. 1,059. Certificate of Proof of Claim. San Francisco, August 5, 1895. This is to certify that the Bank of Sisson, Crocker & Co. (for claim No. 52, H. D. Rowe, manager) has this day made legal and satisfactory proof that it is a creditor of the Pacific Bank, of San Francisco, California, to the amount of forty-eight hundred and ninety-one dollars and one cent, upon the following claim, to wit : Balance due on open account of said H. D. Rowe, manager, as per pass book now on file in Pacific Bank (for proof of claim see No. 52, filed December 12, 1893), and said bank, or the lawful assignee of this claim, will be alone entitled to the dividends thereon. No assignment of this claim, or any portion there-

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of, will be recognized in the payment of dividends, unless notice of such assignment is given, and entered upon the books of the bank, before such dividends are declared, as evidenced by the indorsements hereon. This certificate is to be surrendered to the bank upon the payment of the final dividend. Pacific Bank, by J. E. Farnum, Manager." It is contended by the appellant that this claim is a mere declaration by an officer of the bank, made after the insolvency, and that, even if it be admissible against the bank, it cannot affect the stockholders. If it were relied on as proof of the original deposit, there might be force in the contention. But the original deposit was clearly proved. The controversy is only over the account, whether the deposit remained undiminished, or whether it was reduced to \$228.25. And upon this question the bank book was introduced in evidence by both sides, the appellant expressly offering it on his behalf. This claim was merely the restatement by the manager of what the bank book offered by the appellant showed, being delivered to Rowe in place of the bank book when he surrendered his book to the bank. Hence the appellant could not object to its competency, whatever fault he might find with its weight or significance. The bank book which he had offered in evidence was itself merely the declaration of an officer of the bank. This claim was the declaration of its manager. But, indeed, the deposit was, as we have said, proved without the claim. The case really depends upon the effect of the checks drawn for the purchase of the drafts. If they were not paid by the drafts, the deposits stood unreduced; and this is the plaintiff's case. The subsequent declarations of officers of the bank were only corroborative of the case thus made by the plaintiff. They were not necessary to the plaintiff, and for that reason were of no injury to the defendant. Besides, they were admissible to rebut the presumption claimed by the appellant to arise from the delivery to Rowe of the bank book showing on the 23d of June a balance in his favor of \$228.25. Appellant claims that the

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failure by Rowe, for some uncertain time, to protest against the apparent reduction of his account made an account stated between the parties by reason of his presumed assent. This presumption is rebutted by the entry which the bank book offered by him shows to have been made in it on December 14th, and by this claim, afterwards substituted for the bank book. They were both declarations, as potent to exhibit the true state of the account after the protest and surrender of the drafts as was the book before their protest. That the claim was a declaration made after the insolvency of the bank was, in this aspect, not fatal to it. The bank was still under the control and management of its directors. *Long v. Court*, 102 Cal. 449, 36 Pac. 807. The claim was signed by the manager. It did not purport to be the creation of a new indebtedness, but to be the statement of the old account.

2. The same point is made in reference to a deposit of \$250 made by the plaintiff on June 13th, against which a check was drawn in purchase of a draft on Chicago. The facts are substantially the same, and the same reasoning applies.

3. An assignment of cause of action is made by F. M. Parcells acting for and in the name of Mrs. Fitch. Her authority to him was only verbal. Cause of Action
—Verbal Assign-
ment. But, as such an assignment is not required to be in writing, the verbal authority was sufficient.

4. The only other point made by the appellant is that the claim of Mrs. Fitch was barred by the provisions of section 359, Code Civ. Proc., which requires the action to be brought within three years "after the liability was created." Mrs. Fitch deposited \$208.85 on the 10th day of Limitations. March, 1893. Action was brought on the 10th day of March, 1896. There were at one time conflicting decisions in England and in this country on this question, many cases holding that in the computation of time the first day should be included. The appellant cites a case to that effect. *Presbrey v. Williams*, 15 Mass. 192. But in

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Bemis v. Leonard, 118 Mass. 502, MR. JUSTICE GRAY reviews the cases in both countries with much learning and discrimination, and shows that the whole current of modern authority in both countries is in favor of excluding the first day in cases where the expression of our statute is used, "after the liability was created." The case of *Presbrey v. Williams* is discredited in that case. *Weeks v. Hull*, 19 Conn. 379; *Cornell v. Moulton*, 3 Denio, 12. In this state the case is set at rest by section 12, Code Civ. Proc., which requires the exclusion of the first day. *Misch v. Mayhew*, 51 Cal. 514. I advise that the judgment and order denying new trial be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and the order denying new trial are affirmed.

NOTES.

Payment—Notes and Drafts.—Neither a promissory note, check nor draft, whether it be that of the debtor or of a third person, operates as payment, except by agreement.

United States.—*Wallace v. Agry*, 2 Mason (U. S.) 336; *Allen v. King*, 4 McLean (U. S.) 128; *Humphrey v. Thorp* (C. C. D. Or.), 89 Fed. Rep. 66.

Alabama.—*Bank of St. Mary's v. St. John*, 25 Ala. 566; *Steiner v. Jefferies* (Ala.), 24 So. Rep. 37; *Morris v. Eufaula Nat. Bank* (Ala.), 25 So. Rep. 499; *Lowenstein v. Bresler*, 19 So. Rep. 860, 13 Bkg. L. J. 519; *Fickling v. Brewer*, 38 Ala. 685; *Mooring v. Mobile M. Ins. Co.*, 27 Ala. 254; *Graves v. Shulman*, 59 Ala. 406; *Lee v. Green*, 83 Ala. 491; *Lane v. Jones*, 79 Ala. 156.

Arkansas.—*Greer v. Laws* (Ark.), 18 S. W. Rep. 1038; *Costar v. Davies*, 8 Ark. 213, 46 Am. Dec. 311; *Viser v. Bertrand*, 14 Ark. 267; *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64.

California.—*Grangers' Bank v. Shuey* (Cal.), 55 Pac. Rep. 682; *Welch v. Allington*, 23 Cal. 322; *Griffith v. Grogan*, 12 Cal. 317.

Connecticut.—*Davidson v. Bridgeport*, 8 Conn. 472; *Bonnell v. Chamberlain*, 26 Conn. 487.

Florida.—*Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374, 58 Am. Rep. 667.

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Georgia.—Hatcher *v.* Corner, 75 Ga. 728; Butts *v.* Cuthbertson, 6 Ga. 166; Stewart Manuf'g Co. *v.* Raw (Ga.), 17 S. E. Rep. 748; Kirkland *v.* Dryfus, 103 Ga. 127, 29 S. E. Rep. 612.

Illinois.—Union Nat. Bank *v.* Post, 64 Ill. App. 404, 1 Chic. L. J. Wkly. 165; Hallberg *v.* Brossaw, 64 Ill. App. 520, 1 Chic. L. J. Wkly. 325; Davis & R. Bldg. & M. Co. *v.* Montrose Butter & C. Co., 59 Ill. App. 573; Schumacher *v.* Edward P. Allis Co., 70 Ill. App. 556; Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Strong *v.* King, 35 Ill. 1, 85 Am. Dec. 336; Sanitary Dist. of Chicago *v.* Phoenix Powder Mfg. Co. (Ill.) 79 Ill. App. 36; Medler *v.* Specker, 58 Ill. App. 157; Tyler *v.* Hyde, 80 Ill. App. 123; Wilhelm *v.* Schmidt, 84 Ill. 183.

Indiana.—Sutton *v.* Baldwin (Ind.) 45 N. E. Rep. 518; Price *v.* Barnes (Ind. App.), 31 N. E. Rep. 809; Combs *v.* Bays, 19 Ind. App. 263; Jewett *v.* Bleak, 43 Ind. 368.

Iowa.—McLaren *v.* Hall, 26 Iowa 297; Hunt *v.* Higman, 70 Iowa 406; Cunningham *v.* McGowan, 71 Iowa 461.

Kansas.—Bradbury *v.* Van Pelt, 4 Kan. App. 571, 45 Pac. Rep. 1105; Topeka Capital Co. *v.* Merriam (Kan.), 56 Pac. Rep. 757; Kermeyer *v.* Newby, 14 Kan. 164.

Kentucky.—Sneed *v.* Wiester, 2 A. K. Marsh. (Ky.) 277.

Maine.—Comstock *v.* Smith, 23 Me. 202; Miller *v.* Hilton, 88 Me. 429, 34 Atl. Rep. 266.

Maryland.—Morgan *v.* Britzenberger, 3 Gill. (Md.) 350; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248.

Massachusetts.—Kendall *v.* Equitable L. Assur. Soc. (Mass.) 51 N. E. Rep. 464; Banorgiee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17; Pomroy *v.* Rice, 16 Pick. (Mass.) 22.

Michigan.—Gardner *v.* Gorham, 1 Dougl. (Mich.) 507; Sarmiento *v.* The Catherine C., 110 Mich. 120, 3 Det L. N. 299, 67 N. W. Rep. 1085.

Minnesota.—Wakefield *v.* Spencer, 8 Minn. 376.

Mississippi.—Slocumb *v.* Holmes, 1 How. (Miss.) 139; Bacon *v.* Ventress, 32 Miss. 158; Wadlington *v.* Covert, 51 Miss. 631.

Missouri.—Wear *v.* Lee, 26 Mo. App. 99; Steamboat Charlotte *v.* Lumm, 9 Mo. 64; Appleton *v.* Kennon, 19 Mo. 637; Block *v.* Dorman, 51 Mo. 31.

Nebraska.—Harvey *v.* First Nat. Bank (Neb.), 76 N. W. Rep. 870; National L. Ins. Co. *v.* Goble, 51 Neb. 5, 70 N. W. Rep. 503.

New Hampshire.—Coburn *v.* Odell, 30 N. H. 540; Gilman *v.* Stevens, 63 N. H. 342.

New Jersey.—Ayers *v.* Van Lieu, 5 N. J. L. 765; Park *v.* Miller, 27 N. J. L. 338; State, Joslin, *v.* Giese, 59 N. J. L. 130, 36 Atl. Rep.

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680; *Fry v. Patterson*, 49 N. J. L. 612; *Swain v. Frazier*, 35 N. J. Eq. 326.

New York.—*Johnson v. Weed*, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; *Crane v. McDonald*, 45 Barb. (N. Y.) 354; *Vail v. Foster*, 4 N. Y. 312; *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *People v. Baker*, 20 Wend (N. Y.) 602; *Baid v. Spence*, 28 N. Y. S. 774, 8 Misc. Rep. 535; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538, 40 How. Pr. (N. Y.) 324; *Greenwich Ins. Co. v. Oregon Imp. Co.*, 27 N. Y. S. 794, 76 Hun 194.

North Carolina.—*Smitherman v. Kidd*, 1 Ired. Eq. (N. Car.) 86.

North Dakota.—*Krump v. First State Bank* (N. D.), 76 N. W. Rep. 995.

Ohio.—*Merrick v. Boury*, 4 Ohio St. 60.

Pennsylvania.—*McIntyre v. Kennedy*, 29 Pa. St. 448; *Shepherd v. Busch*, 154 Pa. St. 149, 26 Atl. Rep. 363, 32 W. N. C. 179; *Bixler v. Lesh*, 6 Pa. Super. Ct. 459; *Cridland v. Stevens*, 9 Pa. Super. Ct. 41, 43 W. N. C. 243; *Griffiee v. Griffiee*, 173 Pa. 434, 34 Atl. Rep. 441; *Kilpatrick v. Home Bldg. & Loan Assoc.*, 119 Pa. St. 30; *Berlin Iron Bridge Co. v. Bonta*, 180 Pa. 448, 36 Atl. 867, 40 W. N. C. 127.

South Carolina.—*Costelo v. Cave*, 2 Hill (S. Car.) 523, 27 Am. Dec. 404; *Barrelli v. Brown*, 1 McCord (S. Car.) 449, 10 Am. Dec. 683; *Birmingham v. Forsythe*, 26 S. Car. 358.

Texas.—*McGuire v. Bidwell*, 64 Tex. 43; *Otto v. Halff*, 89 Tex. 384, 34 S. W. Rep. 910; *Western Brass Mfg. Co. v. Maverick*, 4 Tex. Civ. App. 535, 23 S. W. Rep. 728.

Vermont.—*Torrey v. Baxter*, 13 Vt. 452.

Virginia.—*Moses v. Trice*, 21 Gratt. (Va.) 556, 5 Am. Rep. 609; *Blair v. Wilson*, 28 Gratt. (Va.) 165.

West Virginia.—*Hornbrook v. Lucas*, 24 W. Va. 493; *Cushwa v. Improvement, Loan & Bldg. Asso.* (W. Va.) 32 S. E. Rep. 259.

Wisconsin.—*Madison v. Ellsworth*, 33 Wis. 448.

England.—*Belshaw v. Bush*, 14 Eng. L. & Eq. 269; *In re London, etc., Bank*, 34 Beav. 332, 34 L. J. Ch. 418.

Quin v. Earle

QUIN

v.

EARLE.

(Circuit Court, E. D. Pennsylvania, August 9, 1899.)

Insolvency—Deposits—Fraud—Right to Reclaim from Receiver.*—Where a bank, when its officers know it to be hopelessly insolvent, receives a check on deposit, it commits a fraud on the depositor, if he is ignorant of its condition, which vitiates the deposit contract, but the depositor is not entitled to reclaim the proceeds of the check from the funds of the bank in the hands of its receiver, unless it appears that such funds have been increased by the proceeds of the check.

Same—Same—Same—Presumptions.—A bank may receive a deposit when its officers know that it is struggling in the straits of financial embarrassment, from a depositor ignorant of its condition, without committing a fraud; and the burden is upon a depositor alleging fraud in receiving a deposit when insolvent to prove that the bank officers knew or believed, when the deposit was received, that its condition was hopeless.

E. Hunn Hanson, for complainant.

Asa W. Waters and *W. H. Addicks*, for respondent.

GRAY, Circuit Judge. This suit was brought to recover \$3,000, with interest from February 16, 1898 (date of demand from receiver), on the ground that when deposited by the complainant, on the 22d of December, 1897, it was such a fraud on the part of the bank to receive it that it did not become the property of the bank, nor was the relation of debtor and creditor between it and the complainant created. The bill was filed March 23, 1898, and alleges: (1) That pursuant to the national banking act of June 3, 1864, and of its supplements, there was incorporated and organized the Chestnut Street National Bank on

Case Stated.

*See note at end of case.

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June 14, 1887, which from that time until December 22, 1897, conducted its business in the building No. 721 Chestnut street, Philadelphia. That for more than eight years the complainant was a depositor in the bank, and that from January 13, 1891, to his death, February 27, 1898, William M. Slingerly was its president, and exercised supervision over its business. (2) That on December 22, 1897, and for some days prior, the bank was hopelessly insolvent, in a great measure brought about by the irregular dealings of its president, and on December 22, 1897, it was unable to continue business a day longer. This was known to its president, who on the date last aforesaid was in the bank building, and knew its business was so conducted that it represented solvency. That the complainant was ignorant of this insolvent condition, and was not informed by the president and officers, and, had he not been in such ignorance, he would not have made the deposit hereafter mentioned. (3) That on December 22, 1897, and within less than an hour prior to 3 o'clock (the hour when the bank habitually ceased business each day), the complainant, upon the faith of the continuance of its ordinary business, and in ignorance of its insolvent condition, deposited with the receiving teller of the bank a check drawn upon the Fidelity Insurance, Trust & Safe-Deposit Company, requiring it to pay \$3,000 to the order of complainant, who at the time of deposit indorsed it in blank. That the receiving teller entered the sum of \$3,000 as a credit to the complainant upon his bank deposit book, and forthwith sent the check to the Fidelity Insurance, Trust & Safe-Deposit Company for payment. Payment in money was not made, but the said company delivered to the messenger of the bank a check for \$3,000 drawn by it upon the Bank of North America, and received and canceled the check which the complainant had deposited. On the morning of December 23, 1897, the Bank of North America paid its check to the Chestnut Street National Bank. (4) That at 3 o'clock on December 22, 1897, the Chestnut Street National Bank closed its doors, and never thereafter opened them for

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business. That on the morning of December 23, 1897, William M. Hardt, as bank examiner, took into his charge the property of the bank, and so retained control until G. H. Earle, Jr., the defendant, was appointed receiver, in January, 1898, when the said property was transferred to him by the bank examiner. That of the property which so came into the charge of the bank examiner was the said sum of \$3,000, and this he transferred to the receiver, in whose control it now is. (5) That on December 23, 1897, the complainant notified the cashier of the bank not to mingle the said sum of \$3,000 with the moneys of the bank, but to set it apart to answer his demand for its return. That on December 30, 1897, the complainant caused a notice in writing to be served upon the bank examiner, to keep the said sum of \$3,000 to answer his demand for its return as a specific sum belonging to him. And on February 18, 1898, the complainant sent to the receiver a copy of the said notice to the bank examiner, and subsequently demanded the sum of \$3,000 from the defendant. (6) That the circuit court above entitled has jurisdiction of the suit begun by the complainant. That the consequence of the course of the bank, its president and officers, was to deceive, and it did deceive, the complainant, with respect to its hopeless insolvency, and by reason of the matter alleged the complainant is entitled to have the said \$3,000, and that he has no adequate remedy at law. The bill prays that the court make a decree that, by reason of the fraud of the bank, the complainant's deposit of \$3,000 did not create between him and it the relation of debtor and creditor; that the bank, with respect to the said \$3,000, became under equitable obligation to pay it to him without any deduction, and the defendant with notice is under like obligation; that none of the creditors of the bank are entitled to have the defendant treat the sum of \$3,000 as its assets; and that defendant pay complainant the sum of \$3,000. The defenses set up in the answer, which admits most or many of the allegations in the stating part of the bill, are: (1) A denial of the insolvency alleged. (2)

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An allegation that the president and officers of the bank on the 22d of December, 1897, had good reason for confidence in its solvency. (3) An allegation that when, some time prior to 3 o'clock of December 22, 1897, the complainant made a deposit in the bank, and was credited in his pass book with the sum of \$3,000, the total credit to his account was \$3,248.28, all of which was subject to his check at any time during the business hours of that day, and that it was the custom of Philadelphia banks to collect on the day they received drafts and checks upon trust companies, and the bank was only complying with such custom in collecting the \$3,000 check on the day it was deposited. (4) A denial that the \$3,000 deposited by the complainant ever came specifically into the defendant's possession, or that it is now, or ever has been, in his custody, as alleged. (5) That complainant had an open running account with the bank, and that before 3 o'clock on December 22, 1897, the balance due him therein was \$3,248.28, which included the \$3,000 item mentioned in complainant's bill; that the bank was debtor in the amount of this balance to the complainant, and for which he has a just and proper claim for his *pro rata* share in the assets of the bank, provided it is duly proven. The admitted facts seem to be that complainant made the deposit substantially as stated in his bill of complaint; that he received credit for the same in his pass book, as well as upon the books of the bank; that the check, which was to the order of complainant, and upon the Fidelity Trust Company, was sent by the bank for collection within a half hour of its receipt, and before 3 o'clock, and that the Fidelity Insurance, Trust & Safe-Deposit Company delivered to the messenger of the bank a check for \$3,000, drawn by it on the Bank of North America, in payment of the same, and that on the morning of December 23d the Chestnut Street National Bank sent the last-named check to the Bank of North America, which paid the said check to the Chestnut Street National Bank through the clearing house; that the Chestnut Street National Bank at the time of said deposit

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was in a state of financial embarrassment, owing largely, if not altogether, to an indebtedness of some \$800,000 due it from its president, William M. Singerly; that the bank, within a half hour after the said deposit by complainant, to wit, at 3 o'clock in the afternoon (the usual hour for closing) on the 22d of December, 1897, closed its doors; that the bank was never opened again; and that on the next day, the 23d of December, it was taken possession of by Bank Examiner Hardt.

The principle of equity invoked by the complainant's bill is that where a bank, whose officers know it to be hopelessly insolvent, receives moneys or checks on deposit on the very eve of its failure, it commits such a fraud on the depositor, who is ignorant of its condition, that he is entitled to reclaim the moneys or proceeds of checks. This proposition, thus stated, must be assented to. It is a development of the doctrine that a contract founded on fraud is void, and may be rescinded at the option of the defrauded party, and cannot be enforced against him, that no title to property so obtained passes, and that restoration of the property obtained by means of the fraud, if properly identified, can be compelled by appropriate proceedings in law or in equity. Considering the usage of business of the banks, when a general deposit is accepted by a bank there is an implied contract between the depositor and depositary, which creates the relation of creditor and debtor between them. A fraud on the part of the bank which induces the deposit vitiates this contract, at the option of the other party, as fraud would vitiate any other contract, and no rights can arise out of it to the bank. What the remedy may be will depend in this case, as in others, upon the situation of the parties and the subject-matter of the contract. Upon a rescission of the contract, and due notice thereof, the check or draft deposited, or the proceeds thereof, if sufficiently identified, may be reclaimed, if in the possession of the depositary. With regard to personal

Insolvency—Deposits—Fraud—
Right to Reclaim
from Receiver.

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property other than money, the question of identification is generally easy of determination. Not so of money, and perhaps some personal property other than money. If these be confused in the mass of exactly similar things, specific identification becomes impossible. But the more modern doctrine has come to be that, where the fraudulent depositary so mingles goods which he has obtained by fraud with the mass of like goods of his own, the whole may be seized, or considered as held in trust, until equitable separation of the property of the defrauded party is made. So, advancing one step further, where money thus obtained has gone to swell the aggregate in the possession of the fraudulent party, it may, under proper proceedings, be segregated in amount from such aggregate sum, and made the subject of a trust, in order to accomplish the ends of justice. If my bushel of corn be obtained from me by fraud, and be poured into the mass of similar grain in the bin of the party committing the fraud, justice is satisfied, and no one can be wronged, by my having restored to me a bushel of the same grain out of the bin, though the identical grains obtained from me are not restored. If, on the other hand the funds in possession of the defrauding bank be not increased by the property or the money so obtained, so that the aggregate amount of assets for distribution among the general creditors is not made larger by reason of the plaintiff's contribution thereto, then this extension of the doctrine of identification will not apply, and the complainant cannot have remedy as for a preferred claim. All the cases referred to by the counsel for complainant are consistent with this distinction, and the case of *Bank v. Blackmore*, 21 C. C. A. 514, 75 Fed. 771, distinctly elaborates the doctrine just stated; JUDGE TAFT, who delivered the opinion of the court, saying:

"No authority has been cited to show that a claim founded on fraud is entitled to a priority over other claims. It is only where, by the rescission of the contract out of which the claim arises, on the ground of fraud, the specific

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thing parted with, or its proceeds, can be sufficiently identified to be returned, that fraud seems to give a priority of distribution. It may not be necessary to show earmarks upon the proceeds of the thing parted with, to justify such a remedy; but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit. In every case relied on by counsel for appellant, recovery, if decreed, was based on the fact that the property in the hands of the assignee or receiver of the person or bank against whom the claim of fraud, right to rescind, and priority of distribution was made, included in its mass either the very thing parted with, or its proceeds. *Railway Co. v. Johnston*, 133 U. S. 573, 10 Sup. Ct. 390; *Armstrong v. Bank*, 148 U. S. 50, 13 Sup. Ct. 533; *Cragie v. Hadley*, 99 N. Y. 131, 1. N. E. 537."

I have dwelt upon this, because the contention is made by the counsel for the defendant that the evidence discloses the fact that in some way the check on the Bank of North America received from the Fidelity Company by the Chestnut Street National Bank in payment of the check deposited by complainant was settled through the clearing house in such manner that no proceeds from it ever came into the possession of the defaulting bank,—the same having been set off against an indebtedness of said bank,—and that, therefore, there could be nothing analogous to an identification of the check or its proceeds by reason of their having been found in the mass of funds or assets in the receiver's hands, thus swelling the amount to be distributed. But, however this may be, it will not be necessary to consider it, in the view taken of the material question of fact as to which issue is joined, and upon which the case undoubtedly turns. That question is whether, at the time the deposit of the complainant was received by the Chestnut Street National Bank, said bank was hopelessly and irretrievably insolvent, and that fact was known to the officers of the bank,—notably, the president. This is affirmed by the complainant in his bill,

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and denied by the defendant in his answer. Upon this issue of fact this case must be determined. In none of the cases cited by the complainant does this issue seem to have been raised. In the case of *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, the hopeless insolvency of the Marine Bank seems to have been assumed in the opinion of the supreme court, as also the knowledge of the president of the bank of that fact. And in *Wasson v. Hawkins*, 59 Fed. 233, the case came up upon a demurrer to the bill of complaint, which contained allegations of the hopeless and irretrievable insolvency of the bank, and of the knowledge of its president of that fact. For the purposes of the demurrer, these allegations, of course, were taken to be true. So, also, in the case of *City of Somerville v. Beal*, 49 Fed. 790, the case was heard on demurrer to the bill of complaint, and the same allegations contained in it were assumed to be true. The law applicable to the facts thus ascertained is well settled, and is not disputed in this case. If the president and officers of the bank knew or believed that the bank was hopelessly and irretrievably insolvent at the time of receiving the deposit of the complainant, then a fraud was undoubtedly committed by the bank upon the complainant, for which there should be a remedy. But fraud must be proved, and is not to be presumed, and the burden of proof is on the complainant. The mere fact that the bank was in an embarrassed condition, by reason of the large indebtedness to it from its president, is not sufficient of itself to establish the fraud alleged in this case. A trader, whether a corporation or an individual, may be struggling in the straits of financial embarrassment, but with an honest hope of weathering the financial storm and of being eventually solvent. Property received by such an individual or concern in the ordinary course of business during the period of such embarrassment becomes honestly theirs, and the fact that their expectations were unrealized, and their hopes not well founded, would not fasten upon them a fraud that would vitiate their

Same—Same
—Same—Pre-
sumptions.

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business transactions. The most important evidence in this case as to the facts upon which the allegation of fraud is founded is given by Mr. Stotesbury, a member of the firm of Drexel & Co., and introduced by the complainant. This evidence, I think, is fairly summarized by defendant's counsel as follows: That on December 22, 1897, through the efforts of his firm, a plan had been devised for the reorganization of the Philadelphia Record Company, by which \$643,000 out of a total indebtedness of \$817,000 due by Mr. Singerly to the bank was to be paid in cash on the morning of December 23, 1897, and that, so confident was he of the success of the plan, that his firm advanced \$125,000 to the bank on the 21st or 22d of December, in cash, to carry it through the clearing house on the morning of December 23, 1897, when it was expected this payment of \$643,000 would come to the bank as a payment from Mr. Singerly, and to carry the bank over December 22d, when a committee, on the evening of that day, were to examine the trust company's books. Mr. Stotesbury admitted that the payment of the indebtedness of Mr. Singerly to the bank would make the bank solvent. William C. Smith, receiving teller of the bank, introduced by the complainant, testified on cross-examination, on page 20 of the examination of December 2, 1898, as follows:

"Q. Did Mr. Singerly say to you anything on the day before the suspension as to there being any doubt as to its [the bank's] opening the next day? A. During the day before the bank closed, I had every assurance that the bank would be in funds to meet all demands. Q. Who gave you that assurance? A. The cashier. Q. Mr. Steele? A. Cashier William Steele. Q. Did he state the grounds for this assurance? A. He said that the terms had been agreed to by the syndicate to take up Mr. Singerly's liabilities, and furnish cash to enable the bank to go on. Q. How late in the day of the 22d did you have these assurances from the cashier? A. Well, before 3 o'clock. I think, again after 3 o'clock."

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The committee to examine the books of the trust company met on the evening of the 22d, and the result of their examination was such as to cause them to advise the syndicate against going on with the negotiations. They so informed Mr. Singerly, who was present. This was between 10 and 11 o'clock of the evening of December 22d. Mr. Singerly then turned to Mr. Hardt, the bank examiner, and said, "This means, Mr. Hardt, that you will have to take charge of the bank to-morrow morning." I cannot see in all this that Mr. Singerly, as president of the bank, was not, up to the hour named, making a *bona fide* and hopeful struggle to extricate the bank from its difficulties. That he, as men in such straits are apt to be, was over sanguine, does not matter, if the hope really existed, on the grounds here disclosed, at the time the deposit was received. The evidence of Mr. Stotesbury certainly shows that Mr. Singerly had powerful friends, and that a syndicate of ample financial strength had been actually formed to put him in a position to relieve the bank of its embarrassment. I do not think that a fraudulent purpose in receiving the deposit of complainant should be necessarily attributed to him because he did not, under the circumstances, abandon hope of assistance from that source until 10 or 11 o'clock of the evening of that day. Nor do I think that there is any sufficient evidence that he had so abandoned that hope at the time of receiving the deposit. To have suspended the business of the bank, and refused deposits, pending the negotiations upon which his hopes were founded, would have destroyed all prospect of their success.

This testimony above referred to is substantially all that has been adduced by complainant on this subject. The testimony of William M. Hardt, bank examiner, a witness for the defendant, clearly supports the view that the situation on the afternoon of December 22d was a hopeful one. His testimony is to the effect that the payment of Mr. Singerly's indebtedness to the bank, of about \$817,000, would make the bank absolutely solvent; that leading members of the Clearing House of Philadelphia, presidents of

Note

banks and trust companies, had on the 22d of December, 1897, subscribed to a plan, which was practically complete, which provided for the payment of \$643,000 in cash to the bank on account of Mr. Singerly's indebtedness, to be paid on the morning of December 23, 1897; that the remainder of Mr. Singerly's indebtedness, to the extent of \$175,000, was otherwise provided for; that the payment of this money to the bank in full for Mr. Singerly's indebtedness would make the bank's condition absolutely solvent; and that he and Mr. Singerly and the directors and other officers of the bank had every reason to believe, and did believe, that this plan would be carried out, and that the money would be forthcoming on the morning of December 23, 1897, until between 8 and 9 o'clock p. m. of the 22d of December, 1897, when an unlooked for and unexpected obstacle arose, which prevented the final execution of the plan. It appears clear, then, that the transaction of complainant, in the beginning, was free from any trust relationship such as existed in several of the cases cited, where the drafts were deposited with the defaulting bank specifically for collection, or with specific instructions to collect and remit, and that the title to the check and its proceeds in this case passed to the bank upon its deposit and its crediting on the pass book of complainant and on the books of the bank, unless that result of the contract between the complainant and the bank was prevented by the alleged fraud of the bank in receiving the deposit when it was hopelessly and irretrievably insolvent, and that to the knowledge of its president and other officers. It seems equally clear to the court that this material allegation of fraud has not been satisfactorily proved, and the issue of fact therein raised by the pleadings cannot, therefore, be determined in favor of the complainant. The bill must accordingly be dismissed, with costs to be taxed.

NOTE.

Collections—Insolvency—Trust Funds.—If the funds in the possession of the insolvent bank have not been increased by a check deposited when its officers knew of its insolvency, one making such

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deposit cannot have remedy as for a preferred claim. *Midland Nat. Bank v. Brightwell* (Mo.), 1 Bkg. Cas. 379; *Hoffman v. First Nat. Bank*, 46 N. J. L. 607; *City Bank v. Blackmore*, 75 Fed. Rep. 771; *Anheuser-Busch Brewing Ass'n v. Clayton*, 56 Fed. Rep. 759, 13 U. S. App. 295; *Freiberg v. Stoddart*, 7 Kulp. (Pa.) 157; *Sherwood v. Milford, State Bank*, 94 Mich. 78; *Re Seven Corners Bank*, 58 Minn. 5; *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478; *Beard v. Independent Dist. (C. C. A.)*, 1 Bkg. Cas. 385; *Thuemmler v. Barth*, 89 Wis. 381, 62 N. W. 94; *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 193.

The owners of a note deposited it with a bank for collection and the maker paid it by a check on his funds deposited in such bank, which charged it to his balance and delivered the note to him. Shortly thereafter the bank failed. *Held*, that no trust had been created in favor of the owners of the note. *Sherwood v. Milford State Bank*, 94 Mich. 78, 53 N. W. 923.

WARREN-SCHARF ASPHALT PAV. CO.

v.

COMMERCIAL NAT. BANK OF DETROIT, MICH.

(Circuit Court of Appeals, Sixth Circuit, Oct. 23, 1899.)

Checks—Forgery by Agent—Principal's Liability to Bank.—An indorsement of a check purporting to be payable to the order of the principal, by an agent authorized to "indorse and sign checks," implies a contract on the part of the principal that the check itself and all antecedent indorsements are genuine; and the liability of the principal growing out of its relation to the instrument as an indorser, by reason of the fact that the signature of the drawer is a forgery by the agent, is not the usual contingent liability of an indorser, but is absolute, without either demand or notice.

Deposits—Crediting Checks as Cash.—As soon as a check is received and credited as cash, according to the usual course of banking business, the bank has no right to refuse to pay checks against the depositor's account as thus increased.

Checks—Principal and Agent.—A check signed by an agent in behalf of his principal may be drawn in the name of the principal although such name only appears upon the check above the words "Pay to the order of cash."

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Same—Same—Duty of Bank.*—Although a bank is informed that an agent is authorized to draw checks upon it for the “use of” the principal, in the absence of circumstances calculated to arouse suspicion that a check drawn by the agent is for some fraudulent purpose of his own, there is no duty upon the bank to inquire into the purposes of the check, or the use to which the money is to be put.

ERROR by defendant to the circuit court of the United States for the Eastern district of Michigan. *Affirmed.*

This was an action by the Commercial National Bank of Detroit, Mich., against the Warren-Scharf Asphalt Paving Company, a corporation of the state of New York, but having an office and agency at Detroit. The action was brought for the purpose of recovering \$10,000, with interest, alleged to have been advanced or paid out on account of the said Warren-Scharf Asphalt Paving Company under the following circumstances :

First. On the 10th of July, 1897, one C. R. England, being at that time the local agent and representative of the paving company in Detroit, opened a banking account in the name of the said Warren-Scharf Asphalt Paving Company with the said bank, presenting as authority a letter bearing date July 8, 1897, in the following words :

“To Commercial National Bank, Detroit, Michigan—Gentlemen: We beg to advise you that we have to-day issued to our Mr. C. R. England our banking power of attorney, No. 243, which he will present to you. We desire to reopen our account with you.”

Inclosed in this letter was the power of attorney referred to, which was in the words and figures here following :

“Office of Warren-Scharf Asphalt Paving Company,
81 Fulton Street.

“New York, July 8, 1897. No. 243.

“To the Commercial National Bank, of the City of Detroit, State of Michigan: This certifies that C. R. England is officially authorized to indorse and sign checks and deposit

*See Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co., *ante*, 128, and *note*, 152.

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moneys and make drafts on this company in the name and for the use of this company, in and through the Commercial National Bank, of the city of Detroit, state of Michigan, until this power of attorney shall have been officially canceled, but not longer than during the year 1897. The said C. R. England will be specially authorized by official letter or telegram in the personal name of the president or vice president or other duly-authorized official of the company to make drafts for specified amounts. The said bank account to be kept in the name of this company, and all checks drawn against or indorsed for deposit to said account by the said C. R. England to be in the name of this company.

“Warren-Scharf Asphalt Paving Company,

“By F. W. White, Treasurer.

“W. R. Warren, President. [L. S.]”

From time to time between the opening of that account and August 7th, following, England deposited to the credit of the paving company checks drawn in New York by the paving company against the National City Bank of New York, and payable to its own order; the checks being indorsed in Detroit by the paving company through England as its “attorney and cashier.” These checks, according to the usual course of business, were entered upon the company’s pass book and on its account as cash. Against this account England from time to time drew checks payable to “cash,” and obtained the money himself. These checks were usually accompanied by a slip called a “pay-roll order,” showing the denomination in which the money was desired, though sometimes such a memorandum was placed on the back of the check itself. At close of business August 6, 1897, there was a balance to the credit of the paving company of something over \$1,400, of which \$1,200 consisted in one of the company’s New York checks which had been deposited as cash on the 4th of August. On the morning of August 7th this balance was increased by the deposit of a check for \$10,000 purporting to be drawn by the paving company in New York against the National City Bank of

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New York to its own order. This check was indorsed in Detroit by the paving company through England, and at his request passed to the credit of the company as cash, following in this respect the course of business previously pursued. This check and its indorsement were in these words and figures :

“New York, Aug. 5, 1897. .

“No. H2,985. Warren-Scharf Asphalt Paving Company.

“Pay to the order of Warren-Scharf Asphalt Paving Company ten thousand dollars (\$10,000.00).

“Jas. D. Lawrence, Attorney & Cashier.

“To the National City Bank, New York.”

Indorsement : “Pay to order of Commercial National Bank. Detroit, Michigan.

Warren-Scharf Asphalt Paving Company,

“By C. R. England, Atty. & Cashier.”

Just before making this deposit, England, upon one of the paving company's checks, drawn by himself, had drawn out \$1,132.28, ostensibly for the purpose of paying the company's employees; the check being accompanied by a payroll slip containing a memorandum of the denominations of money in which the check was to be paid. That check was in the usual form in which England had been accustomed to draw checks against the company's account. As typical of the manner in which the account had been checked against, we here set out this check, which is as follows :

“No. 14,608C. Detroit, Mich., Aug. 7, 1897.

“Warren-Scharf Asphalt Paving Company.

“Pay to the order of cash eleven hundred and thirty-two and 28-100 dollars (\$1,132.28).

C. R. England, Atty. and Cashier.

“ To the Commercial National Bank, Detroit, Mich.”

Shortly after making the \$10,000 deposit before mentioned, England presented another check for \$10,000, which at his

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request was paid to him in large bills. That check was in these words and figures :

"No. 14,609C. Detroit, Mich., Aug. 7, 1897.

"Warren-Scharf Asphalt Paving Company.

"Pay to the order of cash ten thousand & no-100 dollars (\$10,000.00.)

"C. R. England, Attorney & Cashier.

"To the Commercial National Bank, Detroit, Mich."

With this money England absconded, and has not been since heard from. The check deposited by him on same day, which had made the company's account good, when duly presented on August 9th to the National City Bank of New York for payment, was refused, the signature of the drawer being a forgery. The evidence established that no such person as James D. Lawrence was known to the paving company, and that the signature of James D. Lawrence had been written by England. When England presented the check for \$1,132.28, he told the paying teller that in about an hour he would return and would want \$10,000. This sum he said he would want in cash; that he was going to Toledo in the afternoon about a transaction in which nothing but money could be used; that the banks would be closed, so that he could not take the money in a certified check. He intimated, also, that the transaction at Toledo was one of which no record should be made, and that therefore nothing but money would do him. Before England returned, the paying teller examined England's power of attorney, for the purpose, as he states, of seeing whether there was any limitation upon the amount he might check out. He also asked the bookkeeper whether any deposit had been made to the company's credit that morning, to which the reply was, "Not yet." This interview with England occurred about 10 o'clock in the morning. In the course of the following hour the deposit heretofore mentioned was made with the receiving teller, and at once passed to the credit of the company's account by the bookkeeper. Shortly after that England presented for payment the check for \$10,000 above set out. The paying teller

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made the usual inquiry as to the then state of the account, and was informed by the bookkeeper of the deposit shortly before made, and that the account was good for \$10,000. When the teller handed the money to England, he jocosely remarked, "You want to be careful of this, and don't skip or anything." To which England replied, "I should say not."

Upon the conclusion of all the evidence, the court instructed the jury to find for the defendant in error in the sum of \$10,000, with interest from August 7, 1897.

Fred W. Whiting, for plaintiff in error.

A. E. Angell, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The authority expressly conferred upon England included the power to "indorse and sign checks." The evidence shows that remittances were several times made to him from the New York office of the company by checks payable to its own order. To utilize them, an indorsement was essential. An indorsement

Checks—Forgery
by Agent—Princi-
pal's Liability
to Bank.

of a check purporting to be payable to the order of the paving company, for the purpose of either collection or deposit, implied a contract that the instrument itself and all antecedent indorsements were genuine. Story, Prom. Notes, §§ 135-380, 387; 4 Am. & Eng. Enc. Law (2d Ed.) 447; Harris v. Bradley, 7 Yerg. 310; Turnbull v. Bowyer, 40 N. Y. 456-460; Onondaga County Sav. Bank v. U. S., 26 U. S. App. 377, 12 C. C. A. 407, and 64 Fed. 703. In the absence of circumstances amounting to notice that the signature of the paving company was a forgery, the defendant in error had a right to rely upon the indorsement made by England as a representation and guaranty by the payee that the check itself, as well as the signature of the drawer, was genuine. Although the defendant in error was

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bound at its peril to know the signature of a check drawn by England under the power of attorney to him, yet it was not the payee of this forged check; and it was not bound to know the New York signature of the paving company, or the genuineness of the filling up of a check purporting to have been drawn at the principal office of the corporation upon its New York bank of deposit. Unless, therefore, it acted in bad faith, or the forgery was so obvious that it should have been detected by bare inspection, it was not negligent in accepting the check as a cash deposit in reliance upon the representation of the known local agent of the apparent drawer, and upon the contract implied from the indorsement placed thereon by England under his known authority. *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211-215. Neither in the form or signature of the check, nor in any circumstance occurring when the check was indorsed and deposited, do we find any fact which would justify a jury in holding the defendant in error guilty of any negligence in taking this forged check and crediting it as a cash deposit. The instrument turned out to have been unauthorized by the apparent drawer, and the signature a forgery. If the drawer and payee were not legally identical with the indorsee, the fact that the instrument was not genuine, and the drawer's signature a forgery, would operate to fix the liability of the indorser as absolute, without either demand or notice. In such a case the indorsee would become entitled to recover the amount of the check from the indorser upon the implied warranty that the instrument and the antecedent signatures were genuine. Liability would be fixed before and without any presentation of such a forged check. *Turnbull v. Bowyer*, 40 N. Y. 456-460. The fact that the drawer, payee, and indorser were legally the same person does not change the principle. The indorsement of this check by the paving company, or by one authorized to indorse in its name, was equally effective as a warranty of the genuineness of both the instrument itself and all antecedent signatures. The liability of the paving company

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growing out of its relation to the instrument as an indorser was, by reason of the fact that the instrument was a forgery, not the usual contingent liability of an indorser, but one of fixed responsibility as a warrantor of the genuineness of the paper indorsed.

But it is said that the authority to England did not authorize him to overcheck, and that, until the check deposited had been actually collected, there was no authority to pay the \$10,000 check presented on the same day.

The forged check was the apparent check of a responsible customer upon another bank.

Deposits—Credit-
ing Checks as
Cash.

According to the well-recognized course of banking business, this check was accepted as a cash deposit. Morse, Banks, §§ 569, 570. The receiving teller testifies that in the acceptance of this check, and crediting it at once to the account of the paving company, there was nothing out of the ordinary course of banking business. This evidence is not contradicted or questioned. The bank was under no obligation to credit a check thus deposited as cash, but it was clearly guilty of no negligent or unusual conduct in doing so. When received and credited as cash, the account was subject to check, and the bank had no right to refuse to pay checks against the account thus swollen. *Armstrong v. Bank*, 133 U. S. 433-466, 10 Sup. Ct. 450. The check subsequently paid was in no true sense an overdraft, and the bank became the *bona fide* holder of the forged check for value so soon as checks were drawn and paid by reason of the credit thus obtained.

It is next urged that the check drawn by and paid to England on August 7th was not a check drawn in the name of the paving company. The authority of England was to "indorse and sign checks"; "all checks drawn against or indorsed for deposit to said account by the said England to be in the name of this com-

Checks—Prin-
cipal and Agent.

pany." It is said that the \$10,000 check paid to England was signed only in the name of "C. R. England, Atty. & Cashier." This is a misreading of the instrument. The name of the "Warren-Scharf Asphalt Paving Company" appears

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on the face of the check above the signature of England. It is true that the name of the company appears above the words "Pay to the order of cash." This check was in the form of all previous checks drawn against this account. The name of the paving company is engraved or printed on the check, and was taken from the check book furnished England by the company. It is likewise the form in which the company's name was signed upon checks drawn at its principal office against its New York account. The objection is not well taken.

It is next said that England's authority was limited to signing checks "for the use of" the company, and that this check was drawn payable to "cash," and was presented for payment by England himself, and that a check thus drawn and paid was equivalent to a check payable to the order of England, and was therefore not *prima facie* a check drawn for the "use of" the company. The authority to sign checks for the use of the company imposed no affirmative duty upon the bank to inquire into the purposes of the check, or the use to which the money was to be put. If the bank paid this check in good faith, having no notice of England's fraudulent purposes, and not acting in collusion with him, it should be protected. England was acting within the apparent scope of his agency, and the bank was not bound to inquire into the use he intended to make of the proceeds of the check, it being drawn in usual form and in ordinary course of business. All or nearly all of the checks theretofore drawn against this account had been payable to "cash," and had been presented by and paid to England. It is true that most of them had been accompanied by a slip indicating the kind of money needed, which would possibly imply that the check was drawn for money needed to pay off employees. But there was no other indication than this memorandum made by England himself that the check had been drawn for the use of his company. In the absence of circumstances calculated to arouse suspicion that the check had been

Same—Same—
Duty of Bank.

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drawn for some fraudulent purpose, the bank was under no obligation to know that the drawer's own agent was going to misappropriate the proceeds. The mere fact that this accredited agent of the paving company had drawn this check payable to "cash," and that he presented it for payment himself, was not enough to put the bank upon inquiry as to the honesty of his purposes in the subsequent use of the money. The explanation given by England, that the money would be needed for use in a neighboring city after bank hours, and for a transaction in which money alone would answer, was calculated to lead the bank to the conclusion that the check had been drawn, and that the proceeds were to be used, for the purposes of the paving company. The intimation that the transaction in which it was to be used was one of which no record was wanted carried on intimation that it was not a transaction for the benefit of the company, and justified no inquiry into its character. The inquiries made by the paying teller as to the terms of the letter of authority and as to the then state of the paving company's account were all proper precautions for the security of the bank. There was nothing in the colloquy between England and the bank's teller indicative that suspicion as to the honest purposes of England had been aroused, or upon which the bank should be charged with negligence or as exceeding its authority in respect to paying checks drawn by England. There was no evidence from which a jury might rightfully infer that the bank had notice that England was exceeding his authority or intended a misappropriation. The plaintiff in error intrusted England with the authority to indorse and sign checks in its name, and any loss arising from his dishonesty, when apparently acting within the scope of his known powers, should be borne by those who enabled him to perpetrate the fraud, rather than by one who has innocently suffered. There was no error in instructing the jury to find for the defendant in error, as there was no such conflict of evidence as would properly make an issue for the jury. The judgment is accordingly affirmed.

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SCHOFIELD

v.

STATE NAT. BANK OF DENVER, COLO.

(Circuit Court of Appeals, Eighth Circuit, Oct. 9, 1899.)

Contracts—Implied Agreements.—An agreement in direct conflict with the terms of an express contract cannot be implied from the contract.

Same—Construction.—When the language of a contract is ambiguous, the practical interpretation given to it by the parties thereto when engaged in the performance of the contract, and before any controversy has arisen concerning it, is one of the best indications of its true meaning.

Same—Cause of Action.—It is not enough to sustain a cause of action for money expended for the use of defendant that plaintiff has agreed to expend it, but has never done so.

National Banks—Powers—Discounting.*—The power which a national bank has to discount or purchase commercial paper, and to pay for it immediately, necessarily includes the power to agree upon the amount of the proceeds of the discount or the amount of the purchase price, to loan money upon the security of the paper, instead of discounting or purchasing it outright, and to contract to pay out the money agreed to be loaned on the paper at some future time, instead of at the time when the agreement is made.

Supplemental Agreements—Consideration.—A supplemental agreement, which merely contains the arrangement of the details of the manner of the performance of the original agreement, does not require a separate and independent consideration to make its stipulations binding.

National Bank Assuming Liabilities of Another Bank—Director Holding Stock in Other Bank—Adverse Interest.—A contract, by which a national bank assumed the liabilities of another bank, was ratified by the directors of the national bank, at a meeting where the presence of a certain member of its board of directors, who was a stockholder in the other bank, was necessary to constitute a quorum. There was no charge that such ratification constituted a fraud or imposition upon the national bank. *Held*, that the ratification was not void because voted for by such director.

*The principal authorities on this subject are collected in the opinion.

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ERROR by plaintiff to the circuit court of the United States for the district of Colorado. *Affirmed.*

William C. Cochran (Earl M. Cranston, Robert J. Pitkin, and William A. More, on the brief), for plaintiff in error.

Joel F. Vaile (Edward O. Wolcott, Elroy N. Clark, and Charles H. Toll, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case challenges a judgment which sustained a general demurrer to a complaint made by the plaintiff in error, John W. Schofield, as receiver of the Union National Bank of Denver, Colo., against the State National Bank of that city. Each of these banks was organized and was doing business under the national banking law in June, 1894, in the city of Denver. The complaint disclosed these facts:

Case Stated.

On June 23, 1894, negotiations were pending between the two banks for an assumption by the Union Bank of the indebtedness of the State Bank in consideration of a transfer by the latter to the Union Bank of such a part of its live assets as would be sufficient to secure the Union Bank for paying the debts of the State Bank. On that day R. W. Woodbury, the president of the Union Bank, wrote to John L. McNeil, the president of the State Bank, that it had been impossible for him to make such a personal examination of the paper of the latter bank as would justify him in closing the transaction, but added:

"Now, if your people are disposed to secure us by your entire assets until we can be satisfied in the selection of paper, to reimburse us for the assumption of your liabilities, I will undertake to call our board together to-night at some hour, and let the transfer be announced in the morning papers."

This letter was submitted to the board of directors of the State Bank on that day, and that board passed a resolution to the effect that its president and cashier should contract to sell its office furniture, fixtures, safes, vault, and stationery

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to the Union Bank for \$15,000, and to assign and transfer to that bank sufficient of the bill receivable, moneys, and other assets of the State Bank to secure the Union Bank for its payment of the debts of the State Bank to its depositors, and for borrowed money, in consideration of an agreement by the Union Bank to pay these debts, and in consideration of its obtaining a release of the State Bank from its obligations under a certain lease to one McClintock. Thereupon the Union Bank took possession of the office, furniture, and money of the State Bank on the next day; and on June 25, 1864, the board of directors of the Union Bank approved and adopted the letter of Woodbury, and authorized the president and cashier of its bank "to carry into effect the proposed assumption of the business of the latter [the State Bank], on the general basis of paying its deposit and borrowed-money liabilities, and receiving therefor cash and exchange and good paper and furniture and fixtures sufficient to meet the same." The board of directors of the Union Bank then assumed the liabilities of the State Bank to its depositors, to other banks, to the Denver Clearing House, and to the holders of its certificates and bills payable, and proceeded to pay them as payment was demanded. The liabilities of the State Bank were \$560,641.64. It had \$30,987.78 in cash, and \$21,815.78 in checks in transit and accounts receivable from other banks, which if immediately delivered to the Union Bank; and it had bills receivable, mortgages, and real estate of the face value of \$309,446.80, but the actual value of this part of its assets was less. On July 28, 1894, the stockholders of the State Bank ratified and approved the action of its board of directors, but the stockholders of the Union Bank took no action in the premises. On July 12, 1894, three of the directors of the Union Bank resigned, and John L. McNeil, the president, and two of the directors of the State Bank, each of whom was more interested in that bank than in the Union Bank, were elected directors of the latter bank, and thereafter acted as such. In August, 1894, an agreement, which was evidenced by resolutions passed by the boards of directors of

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the two banks, was made in the performance of the contract of June, 1894, and it was to this effect: The Union Bank assumed the payment of \$31,300, for which the State Bank was liable on certain rediscounts, and covenanted that it would not make or assert any claim or liability against the State Bank or its stockholders beyond the assigned assets. The State Bank agreed to assign to John L. McNeil, as trustee, bills receivable, to be selected by the Union Bank, to the amount of \$564,000 at their face value, as security for the payments made and to be made by that bank in performance of the June agreement. The two banks agreed that the Union Bank might select the rediscounted bills as a part of this security, that it might take any of the bills receivable at their full amount in part payment of its claim; that when it paid the indebtedness of the State Bank to the Mercantile National Bank and the National Park Bank of New York, if it did so within 15 days, the trustee should turn over all the assigned securities to the Union Bank; that while he held them the trustee should collect the securities as fast as possible, and pay \$500 per month out of the proceeds thereof to the president of the State Bank in satisfaction of the expenses of its liquidation; that he should pay over the balance to the Union Bank; and that if, in the end, the property which the Union Bank received from the State Bank produced more than the former expended in payment of the debts of the latter, the surplus should be returned to the State Bank. When the resolution of the board of directors of the Union Bank which bound it to this agreement was adopted, only six members of the board were present, and McNeil was one of them, and his presence was necessary to constitute a quorum. The agreement was performed. Bills receivable which belonged to the State Bank to the amount of \$564,000 at their face value were selected by the Union Bank, and assigned to McNeil as trustee, and he proceeded to collect them, and to apply the proceeds pursuant to the contract. Both the State Bank and the Union Bank became insolvent, and receivers of their property were

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appointed, who succeeded McNeil as trustee, and discharged his duties; and at the time of the commencement of this action the plaintiff, Schofield, as receiver of the Union Bank, had come into the possession of the uncollected balance of the assigned securities, which amounted at their face value to \$279,552.95. The amount collected from these securities and paid over to the Union Bank or its receiver was \$278,233.41. That bank had also received in cash, checks in transit, and in amounts due from other banks, in June, 1894, \$52,803.56, and the indebtedness of the State Bank which it assumed was \$560,641.64; so that, without regard to interest, it assumed an indebtedness which exceeded the amount it has realized from the property of the State Bank assigned to secure it, by the sum of \$229,604.67.

Upon this state of facts, the plaintiff, as receiver of the Union Bank, offers to return the uncollected securities which he holds, and asks for a judgment against the State Bank for the difference between the amount of the debts of that bank which the Union Bank assumed and the amount which the Union Bank has realized from the assets which the State Bank delivered to it and to the trustee. The court below was unable to discover any ground for charging the State Bank with this liability, and dismissed the action.

It is not claimed that there is any express stipulation or provision in the agreement between the banks to the effect that the State Bank shall repay the money which the Union

Contracts—Im-
plied Agree-
ments.

Bank has expended on account of the debts of the State Bank. But the contention is that such a contract must be implied, because that agreement provided that certain of the bills receivable of the State Bank should be assigned to the Union Bank and to the trustee to secure the reimbursement of moneys which the Union Bank expended in paying these debts. But an agreement in direct conflict with the terms of an express contract cannot be implied from such a contract. An implication may not contradict and destroy an express stipulation.

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The letter and the resolutions of June 23 and June 25, 1894, which constitute the original contract, strongly indicate that it was the purpose of the parties to that agreement not to charge the State Bank with any liability, but to relieve it and its stockholders of all liability for its debts. It is improbable that the State Bank insisted so strenuously upon an express agreement from the Union Bank to assume its debts, and agreed to turn over to the latter bank all its valuable assets to secure it from loss in the performance of that contract, without a clear intention and understanding between the parties that the performance of this contract would leave the State Bank free from liability, not only to its creditors, but also to the Union Bank. This, it seems to us is the fair construction and true meaning of the letter and resolutions of June, taken by themselves. If, however, there were any doubt that this is their true construction, it would be removed by the interpretation which the parties themselves placed upon the contract when they agreed upon the details and the manner of its performance in the following August. More than 40 days after this contract was made, and while it was in the course of performance, the two banks met, and agreed upon a method of carrying out and completing it. They put their agreement in writing, in the form of resolutions adopted by the boards of directors of the two banks. The State Bank then inserted in the resolution of its board of directors which authorized and directed the assignment of the securities to the trustee these words:

"It is further understood, and it is a condition of this resolution, that the Union National Bank, in consideration of the benefits derived by it from the arrangement between said Union Bank and said State National Bank, will not make or assert any claim or liability against or upon the part of said State National Bank of Denver, or its stockholders, beyond the said assigned assets."

And the board of directors of the Union Bank passed a resolution accepting this resolution of the State Bank, and

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the condition which it contains. When the language used by the parties to a contract is ambiguous or of doubtful meaning, the practical interpretation given to it by the parties themselves when engaged in the performance of the agreement, and before any controversy has arisen concerning it, is one of the best indications of its true intent. *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057; *Chicago v. Sheldon*, 9 Wall. 50, 54. The express terms of the contracts between the banks forbid the implication that the State Bank agreed to pay to the Union Bank any part of the debts which the latter assumed.

Another position of counsel for the plaintiff in error is that the contract was *ultra vires* of the Union Bank, that the moneys it expended under it were paid for the use of the State Bank, and that consequently there is an implied contract by the latter bank to pay back the balance above the amount which the Union Bank has obtained from the assigned assets as money had and received by the State Bank for its own use. There are many fatal objections to this theory, but we shall notice but two. One objection is that the Union Bank does not allege in its complaint that it has ever paid out or expended any balance. It does not aver that it has paid on account of the debts of the State Bank any more than it has collected from its assets. It does allege that it has assumed and agreed to pay more, and that it has become insolvent. But it cannot recover of the State Bank for money paid out and expended for the use of the latter until it pays out and expends it. It is not enough to

Same—Cause of
Action.

sustain a cause of action for money paid out and expended for the use of a defendant that the plaintiff has agreed to expend it, but has never done so, and has become insolvent, so that he probably never can do so.

Another fatal objection to the argument of counsel here is that there was nothing in the contract beyond the powers of

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the Union National Bank, and therefore there is no foundation for a cause of action for the money it has expended in accordance with the terms of its contract. This agreement required the Union Bank to do nothing which national banks are not authorized to do,—nothing which they do not do in the conduct of the ordinary business of banking. That bank was empowered “to exercise by its board of directors, or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.” Rev. St. § 5136. What did the Union National Bank do here that was not within the powers conferred upon it by the national banking act? It bought the furniture and fixtures of a banking office for \$15,000, assumed the lease of a building in which this office was situated, and proceeded to occupy and use it to operate its bank. But it was empowered to do this by section 5137 of the Revised Statutes. It received from the State Bank \$30,987.78 in cash, and \$21,815.78 in checks in transit and accounts receivable from other banks. It had express authority to receive these amounts as deposits, and by the purchase of the furniture and the receipt of these sums it became indebted to the State Bank in the sum of \$67,803.56. In the absence of an express contract, it would have been bound to pay this amount to the State Bank or to its order; and, if the latter bank directed it to pay this sum to its creditors, it was legally bound to make the payment in that way. It could not have been in excess of the powers of the Union Bank for it to expressly agree to do that which it was bound to do under the law without an agreement. This, however, was not all that it did. It agreed to loan \$192,838.08 (the amount above the \$67,803.56 required to pay the debts of the State

National Banks—
Powers—Dis-
counting.

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Bank), and to pay the debts of the State Bank with this amount; and it agreed to make this loan upon the personal security of the makers and indorsers of bills receivable of the face value of \$564,000, which it selected, and which the State Bank assigned in trust to secure the repayment of the loan, and it promised to turn back to the State Bank any surplus of these securities or of their proceeds which remained after it had been reimbursed for this loan. Let us analyze this transaction for a moment, and see if there is anything here beyond the powers of a national bank. A simple illustration seems to make this matter clear. A. has a promissory note for \$10,000, payable to his order, made by two responsible parties, and due in 90 days. He owes a promissory note of \$9,000, due in 60 days. He takes the former note to a national bank, indorses it without recourse, discounts it, and walks off with the proceeds. No one can successfully question the power of such a bank to loan its money on the security of such a promissory note, or its authority to discount or to buy the paper. *Auten v. Bank*, 1 Bkg. Cas. 416, 19 Sup. Ct. 628, 635; *Smith v. Bank*, 26 Ohio St. 141, 151. But suppose A. leaves the proceeds of the note on deposit in the bank to his credit until his note for \$9,000 falls due. He may then draw his check on the bank for the \$9,000 payable to the creditor, and draw his check for the balance of the proceeds payable to himself, and the bank is legally liable to pay both checks; and this although the makers of the \$10,000 note may have become insolvent, and their note may have become worthless, since it was discounted. Nor would there be anything *ultra vires* of the bank if, when A. discounts the note, the bank expressly agrees with him to do the very thing which at his request it is legally bound to do on account of its discount or purchase of the note; that is to say, to pay his note of \$9,000, and to pay him the balance of the proceeds of the \$10,000 note. Much less would it be beyond its powers to agree to pay the \$9,000 and the surplus it should realize from the \$10,000 note only. But this was all there was in the agreement which the plaintiff in error challenges.

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It is true that the Union Bank loaned its money on more than one promissory note, but if it could lawfully loan it on one, it could do so on two or many. It is true that it did not place the proceeds of the bills receivable which it obtained as security to the credit of the State Bank; that it did not take possession of the bills receivable, but left them in the hands of a trustee; and that it was not bound to pay to or on account of the State Bank any more than the amount of the latter's debts, unless it realized more than that amount from the securities. But these provisions of the contract serve only to bring it further within the powers of the bank than a simple discount or purchase of the paper. Under such a discount or purchase all the proceeds of the discount of the entire purchase price are immediately payable, while under this contract only \$492,838.08 was absolutely payable on account of bills receivable of the face value of \$564,000, and more was payable only in case it was realized from the securities. The whole is greater than any of its parts, and includes them all; and the power which a national bank undoubtedly has to discount or purchase commercial paper, and to pay for it immediately, necessarily includes the power to agree upon the amount of the proceeds of the discount or the amount of the purchase price, to loan money upon the security of the paper, instead of discounting or purchasing it outright, and to contract to pay out the money agreed to be loaned at some future time, instead of at the time when the agreement is made. There is nothing *ultra vires* of the Union Bank in the contract or transaction in issue. U. S. Nat. Bank of New York v. First Nat. Bank, 49 U. S. App. 67, 73, 24 C. C. A. 597, 600, 601, 79 Fed. 296, 300; Bank v. Sharp, 6 How. 301, 322, 323; Bank v. Smith's Ex'r, 40 U. S. App. 690, 23 C. C. A. 80, 77 Fed. 129; Bank of Genesee v. Pachtin Bank, 13 N. Y. 309; Marvine v. Hymers, 12 N. Y. 223; Houghton v. Bank, 26 Wis. 663; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557, 559; Cooper v. Curtis, 30 Me. 488, 490; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722.

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The same considerations which have led to the decision that the agreement in question and its performance were within the ordinary powers of a national bank dispose of the objection that the board of directors had no authority to make the contract.

It is insisted that the agreement of August was void, because the Union Bank received no consideration for it, while

Supplemental
Agreements—
Consideration.

it released the State Bank from liability to repay the money which the Union Bank expended in paying the debts of the State Bank, allowed the

latter bank \$500 per month for the expenses of its liquidation, placed the assigned securities in the hands of a trustee, and not in the possession of the Union Bank, required the Union Bank to assume an additional burden of indebtedness not covered by the original agreement (the \$31,300 for which the State Bank was liable on its rediscounts), and limited the amount of the securities assigned to \$564,000; and because John L. McNeil, who was the trustee, the president of, and more largely interested in the State Bank than in the Union Bank, was one of the board of directors of the latter bank, necessary to a quorum, when the resolution of that board which assented to the agreement was adopted. The agreement between the parties, however, was made in June. For more than 40 days the performance of this agreement had continued. The contract of August was then made. It was a supplemental agreement. It was made and executed in part performance of the June contract. It was nothing more than the arrangement of the details, the specification of the manner of the performance of the original agreement. Consequently it did not require a separate and independent consideration to make its stipulations binding. There was ample consideration in the mutual covenants of the original agreement for all the subsequent acts that were done and all the latter contracts that were made in the course of its performance. *Green v. Railway Co.*, 35 C. C. A. 68, 92 Fed. 873, 877. Moreover, the August agreement was satisfactory to the Union Bank when it was made, and for many years, until it was com-

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pletely performed; and the presumption is that for every burden which that bank then assumed it secured what it deemed ample concessions in return, at the time it made the contract. A fair construction of the June agreement, as we have already held, left the State Bank free from liability to the Union Bank for the money it expended or agreed to expend on account of the debts of the State Bank, so that there was no release of that liability in the August agreement, because the liability never existed. The clause which the agreement of August contained on this subject was only a more positive statement of the original intention of the parties fairly expressed in the June contract. The original contract was that the State Bank should assign "sufficient of the bills receivable, moneys, credits, and other assets to secure the Union National Bank for the payments and liabilities which it shall find it necessary to pay or assume in discharging said debts and liabilities of said State National Bank." One of the main purposes of the supplemental agreement of August evidently was to fix and determine what amount of the bills receivable was sufficient to secure the Union Bank for the payment of these liabilities. If in the latter agreement it was provided that the bills receivable should be held by a trustee instead of by the bank, if he was to pay out of the proceeds \$500 per month to the State Bank for the expenses of its liquidation, if the Union Bank was to assume a liability of \$31,300, and if these burdens upon the Union Bank were additional to those specified in the original agreement, the presumption is that in the securities to the amount of \$564,000, which the Union Bank obtained to secure its liability to pay \$492,838.08, it secured what it deemed a sufficient amount to protect it, not only against its liability for the debts of the State Bank for deposits and borrowed money specified in the June contract, but also against the additional liabilities which it assumed under the terms of the August agreement. The fact that these securities have since proved inadequate is not a vice of the contract.

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but a fault of the bargain. The result is that there was a valuable consideration for the covenants of the Union Bank contained in the August agreement, both in the original and in the supplemental contract, and that the latter was within the powers of the bank and of its board of directors.

Nor was the relation of McNeil to these banks and to this transaction such that his vote for the August agreement as a member of the board of directors of the Union Bank can be

National Bank
Assuming Liabil-
ities of Another
Bank—Director
Holding Stock in
Other Bank—Ad-
verse Interest.

held to vitiate that contract. It was not an agreement with him, nor was it a contract from which he could derive any personal benefit not already secured to him by the June agreement, unless, as a stockholder of the State Bank, he was relieved from indirect liability by the assumption of the indebtedness of that bank for the \$31,300 on the rediscounts, or unless he derived some profit from acting as trustee, and from disbursing the \$500 per month which he received, as president of the State Bank, to pay the expenses of its liquidation. There is no averment in the complaint that there was any fraud or imposition practiced upon the Union Bank. McNeil's adverse interest, if he had any, was too remote, contingent, and uncertain to warrant any court, in the absence of fraud, in abrogating or ignoring the deliberate agreement of these corporations, made many years ago, and completely performed, without objection, long before any action was brought which challenged it.

Counsel for the plaintiff in error have presented many other objections to the contract and to the transactions of these banks, but they are all disposed of by the views already expressed. The judgment below is affirmed.

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STATE (MYERS, PROSECUTORS)

v.

CAMPBELL, COLLECTOR OF THE TOWN OF NEWTON.

(*Supreme Court of New Jersey, Nov. 13, 1899.*)

National Banks—Validity of Mortgage Securing Loan.*—A mortgage of real estate, securing a contemporaneous loan of money advanced by a national bank, is valid *inter partes*.

Same—Debtors—Taxation—Deductions.—The taxation of the shares of stock in national banks, under the act of April 1, 1869 (3 Gen. St. p. 3302), is substantially taxation of all the property of the banks, so that debtors of such banks, who have secured the debts by mortgaging their real estate, may properly claim to deduct the debts from the assessed value of the realty.

Same—Same—Same—Same—Statute.—The act of March 28, 1895 (3 Gen. St. p. 3455), does not impair the right to have debts which are due to national banks, and are secured by mortgage on real estate, deducted from the assessed value of the realty, for the purpose of taxation.

(Syllabus by the Court.)

CERTIORARI by the state to review an assessment of taxes.
Tax set aside.

ARGUED June term, 1899, before COLLINS and DIXON, JJ.

Colie & Swayze, for prosecutor.

L. Van Blarcom, for defendant.

DIXON, J. The prosecutor, a resident of Newark, and owning real estate in Newton, was in the year 1895 taxed at the latter place for the real estate, on a valuation of \$3,800. He duly claimed a deduction for two promissory notes, amounting to \$4,700, drawn by him to the order of John C. Howell, indorsed for his accommodation by Howell, and discounted for him by the Merchants' National Bank in Newton, of which Howell was cashier. At the time of the claim and the levy, the notes were held by the bank, but not yet

*See note at end of case.

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matured. The claim for deduction was based on the fact that the prosecutor had given to Howell two mortgages on the real estate in Newton to indemnify him against his indorsements. The claim was disallowed, and its validity is now the subject for consideration. In *Meyers v. Campbell*, 59 N. J. Law, 378, 35 Atl. 788, this court decided that the notes held by the bank were debts secured by the mortgages, and hence, under our tax act (3 Gen. St. p. 3275, §§ 113, 198), the deduction claimed should have been allowed.

The defendant now, however, raises three objections not presented in the former controversy: First, that, under the national banking law, a national bank has no power to take or hold a mortgage on real estate to secure a contemporaneous loan, and therefore has no right to claim that such a mortgage held by another inures to its benefit; second, that the notes held by the bank were not taxable, and therefore no deduction could be claimed on account of them, under the decision in *Davison v. Silver*, 41 N. J. Law, 505; and, third, that the act of March 28, 1895 (3 Gen. St. p. 3455), forbids the making of any deduction from the taxable value of real estate because of the indebtedness of the owner to a national or state bank.

The first objection is fully answered by the decisions of the United States supreme court in *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, and *Bank v. Whitney*, 103 U. S. 99, 26

L. Ed. 443, where it was held that such a mortgage held by a national bank was valid *inter partes*, and that only the government could question the legality of the transaction. The

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court also cited with approval *Bank v. Haire*, 36 Iowa, 443, to the effect that the equitable claim of a national bank holding a promissory note, that a mortgage of real estate executed by the maker of the note to indemnify the indorser should inure to the benefit of the bank as indorsee, was not within the prohibition of the federal statute.

The second objection, that the notes were exempt from taxation, is not founded in fact. For the purpose of taxation,

Note

corporate property may be represented by the corporation itself as legal owner, or by the corporate stockholders as beneficiaries. *Hancock v. Manufacturing Co.*, 62 N. J. Law, 289, 41 Atl. 846.

Same—Debtors—
Taxation—Deductions.

In pursuance of the act of congress approved February 10, 1868 (Rev. St. U. S. § 5219), the stockholders are to be the parties through whom the property of national banks is made subject to state taxation; and accordingly the legislature of New Jersey, on April 1, 1869 (3 Gen. St. p. 3302), enacted that all shares of stock in such banks should be assessed, either to the holders, if resident in the state, or to the bank, if the holders were nonresident. Under these laws, the shares are to be assessed at their actual value, which represents the value of all the bank's tangible assets, and also of its business and franchises. *Stratton v. Collins*, 43 N. J. Law, 562. In this mode, all of the bank's property is substantially reached by the power of taxation. That the national and state legislatures did not tax the banks themselves for their property was due, not to any design of exempting that property from its just proportion of public burdens, put to a purpose to tax it only once, and in the manner deemed most convenient.

The third objection, rested on the act of March 28, 1895, falls, in view of the proviso of the act, which declares that nothing in the act contained shall be construed in any way to alter or amend the method of taxing bonds and mortgages, or real property which is subject to mortgage. The method of taxing real property subject to mortgage is the matter with which we are now dealing. Our conclusion is that the deduction claimed should have been allowed, and therefore the tax is set aside, with costs.

Same—Same—
Same—Same—
Statute.

NOTE.

Validity of Real Estate Mortgages Securing Loans by National Banks.—A mortgage taken by a national bank as security for a contemporaneous or future loan, although prohibited by the national

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bank act, is not void but only voidable, at the instance of the United States alone, and the collection of the debt may be enforced by foreclosing the mortgage. *Swope v. Leffingwell*, 105 U. S. 3; *Nation Bank v. Matthews*, 8 Otto, 621; *Genesee Bank v. Whitney*, 103 U. S. 99; *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439; *Germania Nat. Bank v. Case*, 99 U. S. 628; *Reynolds v. Crawfordsville First Nat. Bank*, 98 U. S. 621; *Mapes v. Scott*, 88 Ill. 352; *Heath v. Lafayette Bank*, 70 Ind. 106; *Farmers Nat. Bank v. Robinson*, 59 Kan. 777, 53 Pac. Rep. 762; *State Nat. Bank v. Flathers*, 45 La. Ann. 75, 40 Am. St. Rep. 216; *Gundry v. Nat. Bank of Commerce (Baltimore C. C.)* 31 Chic. Leg. News, 220; In *Mathews v. Skinner*, 62 Mo. 329, 21 Am. Rep. 425, it was held that a sale under such a mortgage to satisfy the loan could be enjoined; but *Thornton v. Exchange Bank*, 71 Mo. 221, is in line with the leading case. *Scofield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412; *Simons v. First Nat. Bank*, 93 N. Y. 269; *Oldham v. Wilmington Bank*, 85 N. Car. 240. In *Fowler v. Scully*, 72 Pa. St. 456, 13 Am. Rep. 699, it was held that a sale under such a mortgage to satisfy the loan could be enjoined, but *Winton v. Little*, 94 Pa. St. 64, is in line with the leading case.

HINDMAN

v.

FIRST NAT. BANK OF LOUISVILLE, KY., *et al.**(Circuit Court of Appeals, Sixth Circuit, Nov. 13, 1899.)*

Misrepresentations as to Financial Condition of Customer—Liability of National Bank.*—If a national bank, through its board of directors, in order to increase its deposits or to sell its collateral, makes or causes to be made false statements concerning the financial condition of one of its customers and depositors to a third person, for the purpose of misleading him to his injury, or, for such purposes, conspires with others to have such statements repeated in the newspapers, it is liable if loss ensues through acting on such statements.

Same—Same.—One of the grounds urged in favor of the demurrer to the petition was that the false statements, for which it was contended the defendant bank was responsible, concerning the financial condition of an insurance company were not addressed to plaintiff,

*See *American Nat. Bank v. Hammond* (Colo.), 1 Banking Cases 409 and *foot-note*.

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but only to the insurance commissioner and to probable subscribers to the stock of such company. The petition, however, alleged that the contents of the certificate to the insurance commissioner containing the same statements was repeated in newspapers by the bank and others. *Held*, that the demurrer was not sustainable for such reason, even if plaintiff had no right to rely on the certificate itself.

ERROR by plaintiff to the circuit court of the United States for the district of Kentucky. *Reversed*.

This is a writ of error brought to review the judgment of the circuit court of Kentucky sustaining the demurrer to the reformed and amended petition of Thomas C. Hindman against the First National Bank of Louisville and others, seeking to recover damages for loss

Case Stated.

sustained by the plaintiff in the purchase of 80 shares of the capital stock of the Columbian Fire Insurance Company, which purchase was induced, the petition alleges, by certain fraudulent misrepresentations of the bank and other defendants. The petition originally was ordered by the court to be reformed. A demurrer was filed to the reformed petition, and was sustained. The plaintiff then asked leave to amend, which was granted. The amendment was filed, and a new demurrer filed. This was sustained, and judgment entered for the defendant. (C. C.) 86 Fed. 1013. The reformed petition makes parties defendant the First National Bank of Louisville, C. B. Sullivan, A. W. Hart, and James S. Ray. Ray is made a defendant simply as receiver of the Columbian Insurance Company, and not as a party to the transactions charged against the other defendants. The petition, after setting up the necessary jurisdictional facts as to the diverse citizenship of the plaintiff and defendants, avers that in January, 1893, certain persons duly organized the Columbian Fire Insurance Company under the laws of Kentucky, and applied to the insurance commissioner of that state to do business as such therein, with a capital of \$200,000 and a surplus of \$50,000; that the commissioner entered upon an investigation of the affairs of the company; that the incorporators falsely represented that the capital had been paid in

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full, and that in addition the company had \$48,000 surplus in cash, free from debts and liabilities, and that the whole sum of \$248,182.90 was on deposit in the First National Bank of Louisville, and subject to check; that the commissioner applied to the bank for confirmation of this statement; that board of directors of the bank, knowing the object of the inquiry, caused the bank cashier to make a sworn certificate to the insurance commissioner that the insurance company had on deposit \$248,000 of capital paid in and net surplus; that the statement was untrue, and was made for the fraudulent purpose of enabling the insurance company to deceive the commissioner and secure a license to do business, when it was not lawfully entitled to one; that it was done in pursuance of a conspiracy between the bank and the officers of the insurance company, C. B. Sullivan, A. W. Hart, and others; that, to give the false appearance of such a deposit as was certified, the insurance company and the bank pretended to make certain discounts of promissory notes of notoriously insolvent persons, each of which had been given, as the bank knew, in payment of the maker's subscription to the stock of the insurance company; that the bank had gone through the form of discounting the notes on the indorsement or guaranty of the insurance company, and of placing the proceeds to the credit of the latter on the bank's books; that many of the said notes were not discounted in good faith; that the proceeds thereof were never intended to be, and were never in fact, subject to checks of the insurance company, and the bank had at all times retained a lien on the fund thus apparently standing to the credit of the insurance company. The petition proceeds:

"Plaintiff says that the said First National Bank united with said insurance company and other named defendants, except Ray, in this said fraud, for the purpose of obtaining the benefit that would result to it from having said insurance company keep a large deposit with said bank; it having been previously agreed and understood between said bank and said insurance company that the latter would, if licensed

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to do business, keep a large amount of cash on deposit with said bank at all times. Plaintiff says that in compliance with this agreement said insurance company did thereafter at all times during its existence keep a large amount of cash on deposit in said bank, which deposit was of great value and benefit to said bank. Plaintiff says that said insurance company, having, in the fraudulent manner herein recited, obtained license to do business in Kentucky and in other states, commenced at once to engage in the fire insurance business throughout the various states in which it was licensed. Plaintiff says that said defendants, except Ray, further represented to the plaintiff and to the public, by publications, that the said company had said cash capital and surplus amounting to \$248,182.90, which publications were made in the public prints and scattered over the country, and which were seen and relied upon by plaintiff, and falsely represented that there were no mortgages upon the same or liens upon the same, and that the stock had been paid for at \$125 a share, and that the company was organized and ready for business, and made representations to the effect that the said company was a *bona fide* company, with a sound capital, properly organized; and plaintiff alleges that all the parties named in the caption hereof co-operated with said insurance company and said bank and the officers thereof, and the other defendants, except Ray, in setting said company on foot, and publishing that said cash capital and surplus of \$250,000 had been paid up in cash, *bona fide*, in accordance with said representation. * * * And this plaintiff alleges that by the representations and publications of the defendants, and by the issual of the said statement by said bank to the said Duncan, and the licensing of said company by said Duncan, insurance commissioner, he was deceived, * * * and while deceived by the false representations and deceit and false and fraudulent conspiracy of said defendants in setting on foot and floating said company, and while ignorant of the fraud practiced upon him and the public, and when he believed the representations and publications

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aforesaid to be true, and the false and fraudulent insurance company to be a *bona fide* and genuine insurance company, properly licensed, purchased on February 6, 1893, eighty shares of the capital stock of the said Columbian Fire Insurance Company of America at the price of \$125 a share, making a total of \$10,000, * * * all of which said shares were paid for in cash by said plaintiff, and were issued to him on the 6th day of February, 1893.

"Plaintiff says that it was the purpose of all the said defendants, except Ray, to put stock of said insurance company on the market to be sold, to make up said capital stock, which was short, as hereinbefore alleged, and that the defendants A. W. Hart and C. B. Sullivan, representing themselves and the said other defendants, and acting in collusion with all the other defendants, except Ray, represented to the plaintiff that the said stock thus sold to him had been paid for, *bona fide*, in cash by the original subscriber therefor, which representation was false, and known to them and the other defendants to be false, and that said original certificates would be taken up, and new certificates issued in lieu thereof to the plaintiff; and plaintiff alleges that, as a matter of fact, the shares of stock which were so canceled, and in place of which the certificates filed herewith were issued to him, were shares of stock which had been originally issued to C. B. Sullivan, and for which he had subscribed and not paid, and which had never been paid for by him or any person whomsoever; and alleges that said stock which was thus sold to him was a part of the stock used as collateral in the pretended discounting of notes, by which, on the guaranty or indorsement of the insurance company, money was placed to the credit of said insurance company, to make up the fictitious capital thereof, by the First National Bank, and said bank participated in said frauds, and got the benefit of said payment made by said plaintiff for his stock. All of the defendants, except Ray, knew of the shortage in said capital stock, and fraudulently conspired and contrived the setting on foot of the said insurance company,

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and the selling of said stock to this plaintiff; and plaintiff alleges that said stock, at the time of the sale to him, and at all times during the existence of the company, was absolutely worthless, and known to be so by all said defendants, who knew that said company started in said fraudulent manner, and was unsound. Plaintiff alleges that said company continued in business as a fire insurance company for about fourteen months, but by reason of its not having its capital stock as aforesaid, and of the aforesaid shortage in its capital stock, it was forced to make an assignment on February 27, 1894, and did so assign, and became and was at all times from its inception insolvent, and the stock was and is absolutely worthless."

By amendment to the petition, plaintiff further averred as follows:

"Plaintiff alleges that it was a part of the plan and design of said defendants, among whom was said bank, to have said stock put in the name of parties who did not intend in good faith to take the same, and this was the case with the said stock of C. B. Sullivan, which was sold to plaintiff; and the purpose of so doing was to put off upon plaintiff and sell to him the stock in the said fraudulent insurance company, the said Hindman, plaintiff, to pay cash therefor, and under said plan the said plaintiff was in reality the first allottee of said stock; the said C. B. Sullivan, as plaintiff alleges, being in league with and co-operating with the said bank and other defendants to so sell stock which he had never intended to pay for himself, and to put on foot said insurance company without the alleged capital and surplus, and without the capital paid in as required by law, and knowing that the same had not been paid in. Wherefore plaintiff prays as heretofore, and for all proper relief."

JUDGE BARR, who presided in the circuit court, sustained the demurrer on the ground that the misrepresentations set forth were addressed to the original allottees of the stock, and not to the plaintiff, who was a purchaser from an original

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allottee; following in this the authority of the case of *Peek v. Gurney*, L. R. 6 H. L. 378.

W. W. Thum, for plaintiff in error.

A. P. Humphrey, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The so-called reformed petition and its amendment are inartificially drawn, and are full of redundancy and evidential averments, but we think that they state with sufficient clearness the following case: Several of the defendants other than the bank organized a fire insurance company under the laws of Kentucky. Before the company could do business under the laws of Kentucky, it was necessary for it to procure a license from the state insurance commissioner. The license could only issue upon proof that the capital (\$200,000) of the insurance company had been paid in in cash. But a little over \$100,000 of the capital had been paid in cash and deposited in the defendant bank. To make up the needed remainder, the defendant bank accepted notes of various subscribers to the stock for the amount of their respective subscriptions, with the stock pledged as collateral therefor. The notes were indorsed by the insurance company. Though the proceeds of the notes were credited to the latter on the books of the bank, the amount of them was not, according to the understanding between the bank and the insurance company, subject to check. In order to start the insurance company in business, and thereby secure for itself a large deposit account, and for the further purpose of selling the stock of the insurance company pledged to it as collateral, the defendant bank, through its board of directors, assisted the insurance company to obtain a license by directing its cashier to certify to the insurance commissioner that the insurance company had on deposit with it, subject to check, \$200,000 paid-up capital and \$48,000 net surplus. The license was issued upon the faith of this certificate.

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In further pursuance of its purposes the defendant bank united with the other defendants in procuring the publication in newspapers of general circulation in Kentucky and elsewhere of statements similar to those contained in the cashier's affidavit. The plaintiff, induced by such publications and by the statements in the cashier's affidavit, and relying thereon, bought 80 shares of the stock of the insurance company, which the bank then held as collateral security for a note of one of the defendants given for his stock subscription. Plaintiff paid \$10,000 for the stock. The stock was worthless when he bought it, and has never been worth anything since. The insurance company, owing to the fact that it never had the amount of capital required by law, became wholly insolvent, and was wound up under the laws of Kentucky. The statement of the cashier was plainly false, and known to be so by the bank, for it clearly implied that the capital and surplus were in cash over and above all liabilities.

The argument of counsel for the defendant in error is: First. That the statement of the cashier, in so far as it certified that the insurance company's deposit was for capital and net surplus, was *ultra vires*, and could not be made ground for holding the bank for deceit. Second. It is contended that neither the cashier's affidavit nor the newspaper publications were addressed to the plaintiff, and he had no right to rely on them; that the former was directed to the insurance commissioner only, and the latter to the possible subscribers to the stock, and not to one who, like the plaintiff, bought stock already issued.

First, it is to be observed that the question here is not of the authority of the cashier, as was the case in *First Nat. Bank v. Marshall & Ilsley Bank*, 54 U. S. App. 510, 28 C. C. A. 42, 83 Fed. 725. The petition specifically avers that the certificate was made by order of the board of directors. This was the governing body of the bank, and although, of course, in a certain sense, it is an agency or representative

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of the bank, it is for all practical purposes the bank. *Goodspeed v. Bank*, 22 Conn. 530, 540, 541; *Burrill v. Bank*, 2 Metc. (Mass.) 163; *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 502; *Pollard v. Vinton*, 105 U. S. 7, 12, 26 L. Ed. 998; *Railway Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. 261, 37 L. Ed. 97; *Railway Co. v. Harris*, 122 U. S. 597, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146. The question here, therefore, is whether a national bank can make itself liable in an action for deceit by causing a knowingly false statement to be made concerning the financial condition of one of its customers. In England it is said that a corporation may be held liable for the commission of any wrongful act within the scope of its incorporation. *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Edwards v. Railway Co.*, 6 Q. B. Div. 287; *Clerk & L. Torts*, 49. By this is meant, not that the charter must specifically authorize the wrongful act, but only that it must be committed by the corporation in pursuance of a power lawfully conferred, though wrongfully and tortiously exercised. The same view is taken by MR. JUSTICE CAMPBELL, speaking for the supreme court of the United States, in *Railway Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73, as follows:

"The result of the case is that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as individual is responsible under similar circumstances."

The limits of a corporation's liability for a wrong are somewhat less strictly laid down in later cases in our supreme court. In *Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750, MR. JUSTICE SWAYNE, speaking for the supreme court, said:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they

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may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel."

In *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 6 Sup. Ct. 1055, 30 L. Ed. 176, MR. JUSTICE MILLER, speaking for the court, said:

"The truth is that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power, in the nature of torts, or are *quasi* criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

The latest expression of the court on this subject is found in *Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 19 Sup. Ct. 296, 43 L. Ed. 543, in which it is said:

"The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised."

It is not necessary for us to consider or discuss the difference, if any, between these measures of corporate liability for torts, because we think that the case made by the petition is within the most conservative of them. It is a part of a bank's business to secure as large deposits as possible. It is also part of a bank's business to sell at as high a price as may be the collateral held by it to secure its

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bills receivable. If the bank, in order to increase its deposits or to sell its collateral, makes or causes to be made false statements concerning the financial condition of one of its customers and depositors to a third person, for the purpose of misleading that person to his injury, we think the bank is liable in deceit if loss ensues. The relation of a bank to its depositors and customers is one which gives it exceptional opportunity to acquire most reliable information of their business and financial affairs. It is a common practice for the cashier of one bank to apply to the cashier of another to learn the financial standing of customers of the latter bank, or, indeed, of any person doing business in the city of the latter bank. When the answers made are not made for the benefit or in the business of the second bank, but are merely matters of courtesy between the two cashiers, the second bank is not responsible for their inaccuracy or falsity. This was found to be the state of the case in *First Nat. Bank v. Marshall & Ilsley Bank*, 54 U. S. App. 510, 28 C. C. A. 42, 83 Fed. 725. But the *ratio decidendi* of that case was that if the false answer to the query had been made by the cashier, with the privity of the president, in the business and for the benefit of the bank, the bank would have been liable. It is the usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is argued that, while the bank might properly certify to the amount on deposit to the credit of one of its depositors, it has no power to certify how much of the deposit is for capital and how much for net surplus. This is too refined. The bank's relation to the insurance company as a customer might very well enable it to learn with reasonable certainty how and for what purpose the money deposited had been paid in, and whether it was net capital or surplus, or was likely to be reduced by outstanding liabilities, and

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to give this information to whom it might concern, with the consent of the depositor. It certainly had the amplest knowledge of the fact that the insurance company was a large debtor of the bank,—so large as to make the statement that it had a paid-in cash capital and net surplus of \$248,000 utterly false. If it made such a statement to the insurance commissioner to obtain a license, and was privy to the publication of the same statement in the public press, as is alleged, all for the purpose of securing a large bank deposit and of selling stock held by it as collateral, it seems to us that this was done in the course of the business of the bank, and was “within the scope of its incorporation.” In *Barwick v. Bank*, L. R. 2 Exch. 259, the action was for deceit against a bank. The plaintiff furnished feed to the horses of a government contractor, who was a customer and depositor of the bank, on the written assurance of the manager of the bank that if the plaintiff would do so the bank would pay him out of the first money received by the contractor from the government after the bank had satisfied any claim of its own. The bank then held a note of the contractor for £12,000, but the manager did not disclose this. The court held that the case should be left to the jury to say whether the manager had not given the plaintiff to understand that there was a probability that out of the government payment there would be enough to pay plaintiff, when he knew there was not. This case shows clearly that a bank’s statement concerning the financial condition of its customer is an act within its corporate capacity, at least when made to further the business interests of the bank. The petition charges the bank not only with falsely making the false statement to the insurance commissioner but also with conspiring with the other defendants to repeat the statements to the public in the newspapers in furtherance of the two purposes already stated. It is now well settled that a corporation may be held for torts in which express malice or intent to defraud is a necessary element. *Barwick v. Bank*, L. R. 2

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Exch. 259; *Goodspeed v. Bank*, 22 Conn. 530; *Railway Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Railway Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. 261, 37 L. Ed. 97; *Railway Co. v. Harris*, 122 U. S. 597, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146. It is a necessary corollary from these cases that a corporation may be held for a conspiracy with others resulting in injury to a third person. The point is expressly adjudged by the court of appeals of New York in *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 825; same case in supreme court, 42 Hun, 153. See, also, to same effect, *Moore v. Bricklayers' Union*, 23 Cin. Law Bul. 48, affirmed by supreme court of Ohio, without report, 31 Cin. Law Bul. 208; *Dodge v. Bradstreet Co.*, 59 How. Prac. 104. If a bank may make a false statement concerning the financial condition of one of its customers for its own benefit, and may conspire with another to accomplish its business purposes, it follows that it may conspire with others to circulate the statement already made by it to deceive the public, and that any one of the public, to whom the statement is addressed, and who acts upon it to his injury, may hold the bank for his loss.

The second ground urged in favor of the demurrer was that the statements concerning the financial condition of the insurance company were not addressed to the plaintiff, but only to the insurance commissioner, on the one hand, or to the probable subscribers to the stock of the insurance company, on the other. The plaintiff, it is said, was not the insurance commissioner, and was not a subscriber to the stock, but was a purchaser from an original subscriber. In the case of *Peek v. Gurney*, L. R. 6 H. L. 377, one who, misled by false statements in a prospectus issued by the directors of an intended company, had bought shares therein from an original allottee and suffered severe losses, attempted to hold the directors for his injury. It was held that a prospectus was addressed to the original allottees; that when the allotment was completed the office of the prospectus was exhausted, and one purchasing from

Same-Same.

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an original allottee could not rely on it and hold those issuing it for his loss. The case has not met with entire concurrence by the courts of this country. Dissent from its conclusion is based on the view that one issuing a prospectus or statement calculated to mislead others to their injury ought to be charged with liability to any person or class of persons whose action on the faith of it he might reasonably and naturally anticipate, and that purchasers from original allottees are quite as likely to act on the prospectus as the allottees themselves. We do not find it necessary, however, to discuss the principles of *Peek v. Gurney* in deciding this case, for we think it clear that the averments of the petition make it unnecessary. The newspaper statements of the condition of the insurance company, repeated from the cashier's statement to the insurance commissioner, to all of which the bank is alleged to have been privy, were not issued or addressed to original subscribers to the stock. The petition and its amendment in effect aver that the original subscriptions were made by defendants and others engaged in promoting the company, and that the purpose of the company and the bank was not so much to secure original subscribers, as to sell the stock which had been pledged to the bank to secure payment of the original subscriptions, and which the bank was therefore especially interested in selling. The false statements are thus averred to have been made for the very purpose of reaching and influencing purchasers like the plaintiff, and *Peek v. Gurney* has no application. Even if it be conceded that the plaintiff had no right to rely on the certificate to the insurance commissioner, the repetition of the contents of the certificate in newspaper publications by the bank and others for the very purpose of misleading probable purchasers of the stock is quite sufficient to hold the bank and the other defendants.

A third objection to the sufficiency of the petition and its amendment is that it shows no damage to plaintiff, and fraud without damage gives no action. The contention is that the measure of the recovery in such a case is the difference

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between the price paid and the value of the stock when bought (*Peek v. Derry*, 37 Ch. Div. 591), and that there is no averment in the petition that the stock was not worth what plaintiff paid for it when he bought it. For subsequent losses due to misfortune or mismanagement defendants cannot, it is said, be made responsible in this action. This objection must fail for the reason that the petition expressly alleges that the stock was worthless when plaintiff bought it. The judgment of the circuit court is reversed, with directions to overrule the demurrer to the reformed petition and its amendment, and to require the defendants to answer. The costs of the proceeding in error should be paid by defendants.

FLYNN

v.

THIRD NAT. BANK *et al.**(Supreme Court of Michigan, Jan. 23, 1900.)*

Liability of Directors for Negligence*—Parties.—Where one of the directors of a national bank charged with negligence in the management of its affairs, which is alleged to have resulted in its insolvency, is its receiver, a shareholder may maintain a suit against the directors to have them decreed to pay the amount lost by such negligence; and the refusal of such receiver to bring the suit in behalf of the bank is not a prerequisite to the filing of the bill.

Demurrers.—A general demurrer cannot be sustained where there is matter in the bill upon which any equitable relief can be granted.

APPEAL by defendants from Wayne county circuit court. *Affirmed.*

De Forest Paine and *Wisner & Harvey*, for appellants.

Charles S. McDonald (*Edwin F. Conely*, of counsel), for appellee.

*See *Commercial Bank v. Chatfield et al.* (Mich.) *ante* 21, and *foot-note*.

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HOOKEE, J. The Third National Bank of Detroit went into the hands of a receiver, appointed, as is usual in such cases, by the comptroller of the currency, about February 1, 1894. Joseph L. Hudson, a shareholder and director, was named receiver. The bank is said to have been hopelessly insolvent, and the shareholders have since been assessed to an amount equal to 84 per cent. of its capital stock. The complainant in this suit was one of the shareholders, and his bill is filed, on behalf of himself and other shareholders, against the receiver and others, who at various times held the office of director while the bank was doing business, alleging that the loss of the assets of the bank and its insolvency are due to their neglect and maladministration of its affairs. The bill prays that the several defendants be adjudged responsible for the consequent losses to the complainant and other shareholders, and that the amount for which each should be held liable be determined, and the defendants be decreed to pay such amounts to a receiver to be appointed by the court for the benefit of the shareholders, creditors, and others entitled thereto. The bank, its directors, and the receiver are made parties defendant. Three have answered. The others have demurred. The questions raised are: (1) Want of equity in the bill; (2) that the liability alleged is an asset of the bank, which would go to the present receiver, who is not subject to the jurisdiction of the court in respect to the management and disposition of such assets. The bill charges, among other things, that the defendants' negligence in the management of the affairs of the bank made its ruin possible, and that it would have been prevented had they been diligent; that they willfully or negligently permitted the money of the bank to be fraudulently converted, wasted, and squandered, and permitted irresponsible and insolvent persons to overdraw their accounts, and to borrow money without adequate security, whereby large sums were lost, and knowingly or negligently permitted the withdrawal of a portion of the capital stock by paying dividends in excess of

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the earnings; that, through their negligence, the cashier was able to abstract and misapply the funds of the bank, etc. Many other allegations of negligence are found in the bill. Some of them are even more general than these, while others are not shown to have caused or contributed to the loss of the property of the bank. Some of those first mentioned we consider sufficiently specific, under the circumstances of the case. The case of *Loud v. Winchester*, 64 Mich. 24, 30 N. W. 896, is in point, where it is said: "In an action for an accounting by a trustee for the alleged maladministration of the trust, it is not reasonable to require the complainant to set out in his bill the misdoings which he could not be expected to fully understand until he had obtained disclosures, the beneficiaries not being generally presumed to possess such knowledge from independent sources. In such a suit, any testimony throwing light on the trustee's management of the trust bears directly on the performance of this duty, and may be considered in taking the account and in determining the view to be taken of the conduct of the trustee."

We find it unnecessary to discuss the degree of negligence which will justify a court in holding directors of a bank liable for losses. It is enough to say that the bill charges negligence in various things, and that loss resulted therefrom. That an action for such negligence may be brought on behalf of the bank we have no doubt, and that ordinarily it should be brought by the receiver is admitted. Here, however, the receiver is a director and a defendant. In cases where a receiver refuses to bring an action, it may be brought by shareholders on behalf of the bank, and we think that, where the receiver is chargeable with other directors, it cannot be supposed that he would bring an action against himself, and his refusal should not be a prerequisite to the filing of a bill. See *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Id.*, 99 N. Y. 185, 1 N. E. 663; *Id.*, 105 N. Y. 567, 12 N. E. 58; *Barr v. Railroad Co.*, 125 N. Y. 272, 26 N. E. 145; *Ettlinger v. Car-*

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pet Co., 142 N. Y. 193, 36 N. E. 1055; O'Brien *v.* Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Sage *v.* Culver, 147 N. Y. 246, 41 N. E. 513; Leslie *v.* Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456; Hawes *v.* Oakland, 104 U. S. 450, 26 L. Ed. 827; Bengley *v.* Wheeler, 45 Mich. 493, 8 N. W. 75.

It is urged that the bill is multifarious, but no such defect is pointed out in the demurrer. The rule is settled that a general demurrer cannot be sustained where Demurrers. there is matter in the bill upon which any equitable relief can be granted. The decree of the circuit court is affirmed, with costs, defendants to have the usual opportunity to answer. The other justices concurred.

AUTEN

v.

MANISTEE NAT. BANK.

(*Supreme Court of Arkansas, Dec. 9, 1899.*)

Sending Note to Indorser for Collection—Demand and Protest.—Where a note is sent to a bank, which is an indorser thereof, for collection, it cannot plead in its own defense its failure to make demand and protest.

Negotiable Paper—Authority of Cashier to Indorse.*—A national bank is bound by the act of its cashier in indorsing a negotiable note belonging to it, when such note is taken by one without notice of the cashier's want of authority to indorse for the bank.

Same—National Bank—Demand upon Federal Examiner.—Notice of protest and demand of payment of a note may be made upon an insolvent obligor bank through the federal examiner in charge of its papers where there is no other person upon whom to make demand at the place of demand.

APPEAL by defendant from Pulaski county circuit court. *Affirmed.*

Instruction No. 2 reads as follows: "(2) As to the authority of Cashier Denney to bind the defendant bank by

*See *Valdetero v. Citizens' Bank of Jennings et al.* (La.), 1 Banking Cases 601, and extensive *note*, 611 *et seq.*

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indorsement of the note, I say to you that to the outside world and to parties dealing in good faith the cashier of a national bank is the duly-authorized agent of the bank to make such an indorsement for the bank, and the plaintiff bank had a right to deal with him as such; and the defendant bank would not be relieved of liability by reason of an improper or fraudulent indorsement made by the cashier, Denney, unless the plaintiff bank had notice of such bad conduct or dishonest dealing of the cashier with his own bank."

Instruction No. 4 given by the court, at plaintiff's request, reads as follows: "(4) It matters not what the reasons may have been,—the reasons or inducements actuating W. C. Denney, cashier of the First National Bank, defendant herein, in negotiating or discounting the notes in controversy. If you find from the evidence that said Denney was cashier of the First National Bank, and was dealing with the public as its duly-authorized officer, and that plaintiff had no knowledge that W. C. Denney, cashier, was engaged in defrauding the First National Bank, and that it, in good faith, dealt with him as an authorized officer of that bank, then the court instructs you that Denney's acts were such as are within the scope of his authority as such cashier, and the defendant bank would be bound by his acts."

Cockrill & Cockrill, for appellant.

Dodge & Johnson, for appellee.

BUNN, C. J. This is a suit by the appellee against the appellant, as the indorser on two promissory notes; the one drawn by the McCarthy & Joyce Company, payable to the appellant, at its office in Little Rock, on the 10th February, 1893, dated July 19, 1892, for the sum of \$5,000, with 8 per centum per annum interest from date until paid, and indorsed by James McCarthy and George Mandlebaum, secretary and treasurer. The First National Bank of Little Rock—the drawee—in due course of trade assigned and transferred said note, for value, by indorsement,

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to the appellee national bank, of Manistee, Mich., and the latter thereby became the owner thereof. This note was presented for payment at the First National Bank of Little Rock in due time after maturity, payment refused, and the same was duly protested before suit. This suit is also on a second note, made to the order of George R. Brown on October 10, 1892, for \$4,000, with 10 per cent. interest from maturity until paid, due and payable at the First National Bank of Little Rock, Ark., 90 days after date, by the Press Printing Company, George R. Brown, president, the same falling due January 11, 1893. This second note was duly indorsed by George R. Brown, the payee, to the First National Bank, waiving demand and protest, and by it indorsed and transferred for value to appellee bank, before maturity. In due time it was sent by appellee to appellant bank for collection, it being made payable at its office or place of business. The appellant thus became the agent of the appellee to collect the note, although it was liable thereon, as the immediate indorser, to appellee. The First National Bank of Little Rock, the appellant here and defendant in the court below, thereby was made to occupy, or rather chose to occupy, two antagonistic positions, the one as indorser, and conditionally responsible for the payment of the note, and the other as the agent of the appellee, to collect the same, and, peradventure, from itself. Appellant, after a delay of 12 or 15 days, returned the note to the appellee, with notification of its nonpayment. Upon this state of case the defendant asked the court to give the following instruction (No. 11), to wit: "If the plaintiff is excusable for not making demand and giving notice of dishonor to the defendant bank at the maturity of the Press Printing Company note, it was its duty to do so as soon as the cause of the delay ceased to operate, and if it neglected to do so, the defendant bank is discharged." This instruction the court refused to give, but in its general charge, on its own motion, gave the following on the subject, to wit: "(6) The indorser of commercial paper is not, like the maker, absolutely bound to pay the paper upon which his name

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appears. The indorser's liability is conditioned to pay if the maker, on due presentment at maturity, fails to pay, and upon due notice of such default by the maker being given the indorser [as set forth in other instructions]. (7) So, in this case, the defendant bank would be liable only on such presentment and notice, unless you may find as to one of the notes [the Press Printing Company note] that at the time of maturity, and when payment should have been made, it was in the hands of the defendant bank, as the agent of plaintiff, for collection, and the defendant bank failed to make such presentment and demand, and returned it to the plaintiff bank without having taken such steps. The defendant bank, in such case, would not be discharged of liability by reason of a failure to present for payment growing out of its own failure to discharge its duty to the plaintiff bank, and notice to it would be waived." In refusing to give the instruction asked by defendant and in giving the instruction quoted, the defendant argues that the court erred, and makes this error a ground for its motion for new trial.

The defendant contends that "it is not the usage to send a note to the obligor for collection from himself," citing American Exch. Nat. Bank of Lincoln, Neb., v. Metropolitan Nat. Bank of Kansas City, Mo., 71 Mo. App. 451, and Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, 7 N. E. 601. In the former it is held: "If a bank receiving paper for collection payable at a distant place sends it by mail to the payor for collection, it is guilty of negligence, and this, too, though the payor is the only bank in the place, and though it is customary thus to send paper for collection, since the custom is unreasonable, and though the bank payor failed within the time the forwarding bank had, under the law, to forward the paper, as the forwarding bank in fact forwarded it in a shorter time." This particular question is not a question in the case at bar, as was the question in the Missouri case, between the principal and its collecting agent, for neglect of duty as such on the collector's

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Indorser for Col-
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part, but the question here is one between the owner of the note and immediate indorser. The agency of the latter is only incidentally involved. This indorser claims to be discharged because of the nonprotest of the note, claiming that it was not responsible for the failure to make demand and protest. It was not sued for failing to make demand and protest as against the other indorser, but sued as an indorser; and its only defense is that no demand and protest for the failure of itself to pay is shown. The object of demand is payment; the object of protest is to notify all interested that payment has been refused. It would seem to be a useless procedure to notify one who has made, or ought to have made, the demand, and been refused, that such was the fact. It is true that it is said by many authorities—and that is doubtless the law—that it is negligence *per se* on the part of the holder of a note to send it to one of the obligors for collection; but it is only negligence in the holder in so far as he has appointed an improper agent to collect the note, for the delinquent agent ought not to be heard to plead his own failure to do his assumed duty as agent; and, besides, the question of negligence does not arise when the person who is such agent and also an obligor is sought to be bound in the latter capacity only. It is not a question of negligence, but of notice, which is always necessary in order to bind an indorser, unless there has been a waiver, express or implied. The instruction of the court put this question to the jury properly, and there was no error in that regard.

The case of Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, 7 N. E. 601, was where the packing and provision company gave the bank a certified check of Kielsen on Rice & Messman, bankers, of Cadellac, Mich., for collection. The collecting banks failed to collect, and the Bank of Cadellac failed. The suit was brought by the packing and provision company against its agent, the Drovers' Bank, to hold it responsible for negligence in not making demand, etc., and their failing to collect before the payee bank failed. The collecting bank was held liable,

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because it had sent the check directly to the bank primarily liable for collection, and not to a proper agent to see to the collection. That was a suit for negligence in the agent. The suit at bar is against the Little Rock bank as one of the obligors on the note. It pleads, not diligence, but a want of notice of protest and nonpayment, for its defense.

The next question is whether or not the Little Rock bank is bound for the acts of its cashier, Denney, in negotiating these notes. The facts are that this bank received these two notes; whether by purchasing the same, or for its own accom-

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modation, it is really impossible to say, nor does it matter, in one view of the case. The cashier, Denney, had had business conferences with the representatives of the appellee bank, which seems to have money to loan, in the usual course of banking business, and the Little Rock bank required money, as its officials represented, to enable it to meet its demands in removing the cotton crop. Whether this was the real reason or not, it does not matter, so far as parties who did not know or have reason to know the contrary are concerned. The appellee bank paid the Little Rock bank the money on the two notes in question, and by direction of the latter deposited the amount with the New York bank to its credit. In due time the appellee demanded the payment of the two notes, and payment was refused. It then sued the appellant bank as one of the indorsers on each of the two notes, and the real beneficiary of their sale to the appellee; and the defense is that Denney, the cashier, had no authority to bind his bank in such a dealing. On this point the court below gave its instruction No. 2, and also for plaintiff No. 4, in which we see no error. See, also, recent case of *Auten v. Bank*, 19 Sup. Ct. 628, 43 L. Ed. 920. That the president or other official of the Little Rock bank should have successfully schemed to divert the Little Rock bank's funds to its credit in the New York bank to his own use by making use of his official authority cannot be introduced to defeat the claim of the Manistee bank in this action. It had parted with its

Moore v. Chesebrough

money in due course of trade, and paid it out on the direction of the appellant bank; and certainly a misuse or misapplication of it afterwards by the fraud and chicanery of the appellant bank ought not to prejudice the appellee bank, if it is innocent; and there is nothing shown to the contrary.

It is contended by the defendant that demand and notice upon Armstrong, the federal examiner in possession of the insolvent bank, was irregular, and not sufficient to bind the bank. Armstrong was not, it is true, an officer or agent of the corporation, but was, by operation of law, in charge of its books, papers, and other papers to the exclusion of all others. There was, therefore, no other person upon whom to make the demand at the place appointed in the note. See Rand Com. Paper, § 1083, by analogy. Besides, the taking position by the examiner was notice to all the world that no payment would be made, unless afterwards in the course of administration. This disposes of the essential questions. The judgment is affirmed.

Same—National
Bank—Demand
upon Federal
Examiner.

MOORE

v.

CHESEBROUGH *et al.*

(*Supreme Court of Iowa, Jan. 16, 1900.*)

Special Deposits—Assignments—Trust Funds.*—Where it affirmatively appears that the assets of an insolvent banking firm were not augmented by a sum deposited with the firm for a specific purpose, prior to an assignment by it for the benefit of creditors, but the money was merely used to pay another creditor, the sum so deposited will not be held a preferred claim against the assets in the hands of the assignees.

APPEAL by plaintiff from Muscatine county district court.
Affirmed.

*See *Quin v. Earle* (C. C.), 2 Bank Cas. 161, and *note*, p. 171.

Hodgin v. People's Nat. Bank

J. E. McIntosh and P. M. Detwiler, for appellant.

Carskaddan & Burk and Jayne & Hoffman, for appellees.

PER CURIAM. This case is ruled by *Jones v. Chesebrough*, 105 Iowa, 303, 75 N. W. 97, and *District Tp. of Eureka v. Farmers' Bank of Fontanelle*, 88 Iowa, 194, 55 N. W. 342, as by the stipulation of facts it affirmatively appears that the assets of the assignor were not augmented in any way by the delivery of the plaintiff's money. All money used was borrowed, and, by taking that of plaintiff to pay the debt to another, he was made a creditor, instead of some one else. Thereby neither the volume of assets nor indebtedness was materially changed. Affirmed.

GRANGER, C. J., not sitting.

HODGIN

v.

PEOPLE'S NAT. BANK.

(Supreme Court of North Carolina, Dec. 19, 1899.)

Rehearings.—When a rehearing has been ordered, and a manifest error is made to appear, it is the duty of the supreme court to correct its own decision, even though rule 53, p. 711, Clark's Code, has been violated in ordering the rehearing.

Same—Sufficiency of Petition.—The petition to rehear complied with the requirements of such rule.

Deposits by Surviving Partner—Right to Apply Deposits to Debts.*

Where a bank knew that the surviving partner of a dissolved co-partnership made deposits in such capacity, it was bound to know that he held them in trust for the payment of the debts of the dissolved firm, and, therefore, it had no right to apply them to the payment of a debt due it and created by the partnership prior to its dissolution.

Reversed on rehearing.

FOR former opinion, see 32 S. E. 887.

*See note at end of case.

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FURCHES, J. This is a petition to rehear. The same case was before the court at February term, and is reported in 124 N. C. 540, 1 Bk. Cas. 498, 32 S. E. 887; and it is now contended for defendant that the case should not be reheard, for that to do so would violate the rules of practice prescribed by this court in *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881; *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741; *Tucker v. Tucker*, 110 N. C. 333, 14 S. E. 860; *Emery v. Railroad Co.*, 105 N. C. 45, 11 S. E. 162; *Gay v. Grant*, 105 N. C. 478, 10 S. E. 891, and 11 S. E. 242; *Watson v. Dodd*, 72 N. C. 240; and *Mullen v. Canal Co.*, 115 N. C. 15, 20 S. E. 167,—where it is said that a case should not be reheard unless it shall appear that facts have been overlooked, or some authority has been overlooked, or that the case has been decided hastily and without full consideration, or that the opinion contains a legal error. Some of the cases cited were decided before the adoption of rule 53, p. 711, Clark's Code, and may have led to the adoption of that rule, and those decided since its adoption have been in conformity to this rule, and the cases cited may be found in Clark's Annotated Code under that rule, except those cases that have been decided since that Code was published. This rule, as we understand it, was intended for the guidance of the justice who orders the rehearing. But we will admit that it has not always been observed in granting applications to rehear, as in *Burke Co. Com'rs v. Catawba Lumber Co.*, 116 N. C. 731, 21 S. E. 941, and other cases that might be cited. But after the rehearing has been granted, and the case has been argued upon the rehearing, and a manifest error is made to appear to the court, is it contended that the court should not correct the error because it was not pointed out on the former argument, and not discovered by the court on the former hearing? Is it contended that the court is estopped to correct an error of law on a rehearing, even if it was considered, and erroneously decided, on the former hearing?

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The writer of this opinion has probably been more pronounced than some of the other members of the court in announcing to the terms of rule 53 in granting rehearings, and he does not think they should be granted upon alleged errors of law, unless it manifestly appears to the justice granting the rehearing that there is such error. But when the rehearing has been ordered, and a manifest error is made to appear, it is the duty of the court to correct it. This is frequently done by this and other appellate courts in overruling former decisions when they are found to be erroneous, and stand in the way of a correct decision of the case under consideration. It cannot be less its duty to correct its own decision when found to be manifestly erroneous.

We have discussed this question at some length, upon the general question of rehearing cases, as it seemed necessary for us to do so on account of the serious contention that has been made against our considering the alleged errors for the reason that they were considered in the former opinion of this court; but, so far as the rehearing in this case is concerned, the petition to rehear complies with the requirements of rule 53.

The petition to rehear alleges and undertakes to point out both errors of fact and errors of law contained in the statement of facts and questions of law in the opinion of the court, and, by inadvertence, the facts as they really exist were overlooked by the court. It is stated in the opinion of the court that "the plaintiff contends that neither amount could be deducted, and that all the defendant was entitled to was to prorate with other creditors of the firm debt only, and not upon the individual debt of L. L. Lunn at all." The petitioner alleges that in this statement there was error; that, as a matter of fact, he contended that he was the sole owner of this fund, in trust, and had the right to pay it out to creditors of the firm as he chose, but that he had intended to pay out *pro rata*; and, upon an inspection of the record, this contention

Same—Sufficiency of Petition.

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of the petitioner seems to be correct, and that the statement of the court, inadvertently made, is not correct.

It is stated in the opinion of the court "that there was a verdict in favor of the defendant," and the petitioner alleges that this is another inadvertent statement which is not correct. The petitioner alleges that, as a matter of fact, the jury found all the issues except the eighth and those agreed upon by the parties, for the plaintiff; and upon an examination of the record it appears that the eighth issue is the only issue upon which the defendant claims that a judgment should be rendered in its favor. There are other errors alleged in the petition to rehear, to which we make no reference, and have only specially noticed these for the purpose of showing that the petition complies with the requirements of rule 53.

The question, then, is, is there error in the judgment of the court rendered at the last term? And, to save repetition and time, we may say that every issue was found for the plaintiff, except the eighth, which the defendant claimed entitled it to the judgment of the court, and it was upon this issue that the court gave judgment for the defendant. This issue is as follows: "Were the said two sums, as alleged in the complaint, amounting to \$3,037.77, deposited with the said bank, to be held by the said bank, with knowledge that it was a trust fund for the benefit of the creditors of Hodgin Bros. & Lunn?" Upon this issue, among other things, the plaintiff requested the court to charge that if the defendant received these funds from the plaintiff, whom it knew to be the surviving partner of the firm of Hodgin Bros. & Lunn, though they were derived from the assets of the firm, still they were trust funds belonging to the plaintiff, held by him for the benefit of creditors. The court declined to so charge, but charged the jury that, if the bank received these funds from the plaintiff as the survivor of the firm of Hodgin Bros. & Lunn, said funds belong to the plaintiff as trustee for creditors, and the bank, knowing these facts, would hold

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them in trust; but, as they were derived from the assets of the firm of Hodgin Bros. & Lunn, the bank had the right to apply them to the payment of the indebtedness of Hodgin Bros. & Lunn, unless they had been placed there by plaintiff and received by defendant as a "special deposit"; and that, if the jury find that the \$650 debt was made for the benefit of the firm, it (the bank) had the right to apply this fund to the satisfaction of that debt also. So, after all, the eighth issue, and charge of the court upon that issue, may be regarded as the "storm center" of this case on the rehearing.

The plaintiff, Hodgin, testified: "I went to Mr. Blair, vice president of the bank, and asked what was my duty. He said, 'Collect the assets, and pay debts in dividends.' Again, I told Mr. Blair, as the bank was a creditor of Hodgin Bros. & Lunn, I wanted to deposit assets with him, in order that he might see that the funds were properly applied." This evidence was not contradicted or disputed, though Mr. Blair was afterwards examined as a witness in behalf of the defendant; and, what is a little singular, the plaintiff contends that this evidence is in his favor, while the defendant contends that it is in its favor. We do not see that it is very material to either side, except that it emphasizes the fact that the defendant received this fund from the plaintiff knowing that he was making the deposit as the surviving partner of the firm of Hodgin Bros. & Lunn; and this, to our minds, is the turning point in the case. It was held in the former opinion (124 N. C. 540, 32 S. E. 887) that the defendant had no right to apply this fund to the payment of the \$650 note of L. L. Lunn, and that there was error in the judgment appealed from to that extent; and, as the petition to rehear alleges no error in that part of the opinion of the court, it is not necessary to notice this debt further, and we will not do so.

The question then, is, was the judgment of this court at the former term erroneous as to the other debt due the

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defendant by the firm of Hodgin Bros. & Lunn? We are of the opinion that it was. The learned judge who tried the case below held that the plaintiff was the legal owner of this fund, and that he held it in trust for the payment of the debts of the dissolved co-partnership of Hodgin Bros. & Lunn. This was correct. But he further held that, when he deposited it with the defendant, the defendant then had the right to apply it to the payment of the debt due to it by the dissolved co-partnership, "unless he placed it there as a special deposit." In this instruction there is error. It seems to us that the learned judge did not distinguish the difference between a deposit of a special fund, known to be such by the defendant, and a special deposit. A special deposit cannot be checked upon, because it does not belong to the bank. It remains the property of the depositor, and must be returned in specie; that is, the same thing deposited must be returned to the owner. And, if it is lost or stolen without the negligence of the bank, it is the depositor's loss. But this is not so in cases of a general deposit, or in cases of a general deposit of a special fund, or of a fund for a special purpose, where the facts are known to the bank. *Bank v. Armstrong*, 15 N. C. 519. In this case the facts were all known to the defendant bank at the time these deposits were made. It knew that Lunn was dead, that the plaintiff was the only surviving partner of the firm, and that he was making the deposits as the surviving partner; and, knowing these facts, the bank was in law bound to know that the plaintiff was the owner of these deposits, and that he held them in trust for the payment of the debts of the dissolved co-partnership. *Weisel v. Cobb*, 114 N. C. 22, 18 S. E. 943. And, knowing these facts, it had no right to apply them to the payment of a debt created by the partnership before its dissolution. *Bates, Partn.* § 720; *Story, Partn.* § 348; *Case v. Abeel*, 1 Paige, 398; *Nelson v. Hayner*, 66 Ill. 487; 17 Am. & Eng. Enc. Law, 1154. It is thus seen that

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ner—Right to
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the plaintiff was the owner of these deposits, though he held them in trust for the benefit, first, to pay debts of the partnership, and then for the benefit of the estate of the deceased partner; and it is only where the depositor stands in the same relation to the bank as the debtor, and deposits funds that belong to him and are held by him in the same right as the debtor, that the bank has a right to appropriate and apply the deposits to the payment of a debt due to it. There must be a mutuality between the debtor and creditor and between the debt and the fund deposited. If the fund is a trust fund, it cannot be applied by the bank to the payment of an individual debt. *Morse, Banks*, § 334; *Galbraith v. Tracy*, 28 L. R. A. 130, and note (s. c. 38 N. E. 937); *Gillett v. Gaffney*, 3 Colo. 351; *Russell v. McCall*, 141 N. Y. 437, 36 N. E. 498; and other authorities might be cited, but we do not deem it necessary to do so. Upon examination, we do not think that *Jordan v. Bank*, 74 N. Y. 467, and *Morse, Banks*, § 325, sustain the defendant's contention that it had the right to make this application, and that, if they are so construed, this construction puts them in conflict with all the other authorities we have consulted.

It was contended for the defendant that the case of *Simson v. Ingham*, 2 Barn. & C. 65, is directly in point for the defendant. But, upon examination of that case, it will be found that it has no application to this case. There, as will appear by examination, two banks in England had dealings with each other, one in London and the other in the country. They were private banks,—co-partnerships, not corporations,—and therefore all the partners were liable. One of the partners of the country bank died, causing a dissolution of the partnership. The other partners continued the business, and continued to deal with the London bank. The new firm drew upon the London bank, and also made deposits in that bank. When the deposits were made by the new bank, the business of which was carried on by the surviving partners

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of the old bank, the London bank at first entered them to the credit of the account of the old bank, which was largely indebted to the London bank at the dissolution of the old country bank. But, before the London bank had furnished the country bank with a statement of its account, it changed the entries on its books, and placed the deposits made by the new country bank to its own credit. To this the parties bound for the liability of the old bank to the London bank objected, and contended that, inasmuch as the London bank had at first credited the old bank with these deposits, it could not afterwards change these entries, and credit them to the new bank. And this is the question presented and decided in the case of *Simson v. Ingham*. The court held that, as the bank had not notified the new bank of this application, it had the right to make the change, and apply the deposits of the new bank, which had made them. So, it is plain to be seen that *Simson v. Ingham* does not in any way present the point involved in this case, nor does the decision in that case bear upon the case now under consideration in the most remote degree.

While it is said, and truly said, that a court does not like to overrule itself, yet it should do so at the earliest moment, when it is manifest that it has been in error. Upon a careful review of the case and the authorities, we are satisfied we fell into error. There was error in the trial below, as pointed out in this opinion, for which the plaintiff was entitled to a new trial upon the debt of *Hodgin Bros. & Lunn*, as well as upon the individual debt of *L. L. Lunn*. It is so ordered now. New trial.

CLARK, J. (dissenting). This is a rehearing of the case decided at the last term. 124 N. C. 540, 32 S. E. 887. Neither a single fact nor a single authority is alleged to have been overlooked. Indeed, no new authority is cited for the rehearing. The case stands precisely upon the same facts and authorities as upon the former hearing, and the court has repeatedly said that, in such case, the petition for rehear-

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ing will not be allowed, but will be dismissed. *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881; *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741; *Tucker v. Tucker*, 110 N. C. 333, 14 S. E. 860; *Emery v. Railroad Co.*, 105 N. C. 45, 11 S. E. 162; *Gay v. Grant*, 105 N. C. 478, 10 S. E. 891, and 11 S. E. 242; *Watson v. Dodd*, 72 N. C. 240; *Mullen v. Canal Co.*, 115 N. C. 15, 20 S. E. 167; and numerous other cases, some of which are cited in *Weathers v. Borders*, *supra*, at last term. Not only does this case come within the ruling in *Weathers v. Borders*, in that no new fact or authority has been cited, but, on the contrary, there was an important fact and a direct authority overlooked which went to support the decision of the court at last term, and which are additional reasons why that decision should be sustained.

The following fact appeared in the record, though it was not deemed necessary to advert to it in the former decision of the case: "After the death of Lunn, the plaintiff commenced collecting in the debts due the firm, and, not knowing what to do with the money, went to the president of the defendant bank, and [among other things] said to him, 'The firm is owing you, and I want to deposit the assets with you, that you may see they are properly applied.' Thereupon the plaintiff made his deposits in the defendant bank, and they were entered as deposits of *Hodgin Bros. & Lunn*,"—the style of the indebtedness owing to the bank. This was tantamount to an agreement to deposit the collections by the surviving partner in the bank, so that the bank might have it in its power to apply the same to the indebtedness due to it by the firm. It was certainly calculated to prevent the bank from suing to recover its debt, when the surviving partner promised to collect the assets, and place them in the bank, so that the bank might see to their application, and made such deposit in the same style, "*Hodgin Bros. & Lunn*," in which the indebtedness to the bank stood.

There there is an express authority, not called to the attention of the court at last term, which sustains the former

Note

opinion of the court (and no authority whatever is shown to the contrary). In *Simson v. Ingham*, 2 Barn. & C. 65, it is said: "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor [in that case, as in this, the continuing to deposit in a bank in the name of the old firm], and the latter joins the transactions of the old and new firm in one entire account [as was done here], then the payments made from time to time must be applied to the old debt." It is further said in the same case that if the deposits had been entered in the pass book merely in the name of the old firm, and the surviving partner had not objected, the deposits would have been applicable to the old debt, though the surviving partner or the bank, before such deposits were entered, could have elected to place it to the credit of the surviving partners or new firm. But here the case is still stronger for the bank, since it not only entered the deposits made by the surviving partner to the credit of the old firm, but did so at the request of the surviving partner, for the avowed purpose that the bank, which he said the firm was owing, "might see to the application of the deposits."

NOTE.

Deposits—Set-Off. See 1 Banking Cases 75 *et seq.* In *Baker v. N. Y. Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150, it was held that a bank having notice that a deposit made by an insolvent commission firm was intended to protect a person as whose agents the firm was acting, cannot, although such firm consents, charge against such deposit an individual debt of the firm.

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BANK OF BLACKWELL

v.

DEAN.

(*Supreme Court of Oklahoma, Feb. 8, 1900.*)

General and Special Deposits—Definitions.—Deposits of money in a bank are either general or special. A general deposit is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor.

Same—Presumptions.—Deposits of money made in a bank in the ordinary course of business are presumed to be general, and the burden of proof is on the depositor to overcome such presumption by showing that the deposit was made under such stipulations or directions as to constitute it a special deposit.

Bank's Relation to Depositor.*—Unless there are stipulations to the contrary, deposits of money made in a bank become part of its general funds, and create the relation of debtor and creditor between the depositor and the bank.

Same—Insolvency of Bank—Priority.—A general depositor is merely a general creditor of the bank, and is not entitled to any priority of payment over other general creditors in case of an assignment for the benefit of creditors or of bankruptcy.

(Syllabus by the Court.)

ERROR from Kay county district court. *Affirmed.*

Cline & Hill, for plaintiff in error.

Dale & Bierer, for defendant in error.

BURFORD, C. J. The bank of Blackwell, a banking corporation at Blackwell, Okl., on January 2, 1897, drew its draft on the bank of Kildare, a banking corporation doing business at Kildare, Okl., payable to its own order, for the sum of \$400, and sent the draft by mail to the Metropolitan National Bank of Kansas City,

Case Stated.

*See note, 1 Banking Cases 95 *et seq.*

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Mo., to be placed to the credit of the Bank of Blackwell. On the same day the Bank of Blackwell sent \$400 in currency to the Bank of Kildare, to cover the amount of its draft when same should be presented. The Metropolitan National Bank sent the draft to the Bank of Kildare for payment, and the Bank of Kildare canceled the draft, and issued its own draft upon the Farmers' National Bank of Arkansas City, Kan., for a like sum, and sent said draft to the Metropolitan National Bank, to settle the amount due on the draft issued by the Bank of Blackwell. The Metropolitan National Bank sent the latter draft to the Farmers' National Bank of Arkansas City for payment, but in the meantime the Bank of Kildare had failed and made an assignment, and the latter draft was protested for nonpayment. The Metropolitan National Bank then canceled the credit of \$400 it had given the Bank of Blackwell. The Bank of Blackwell paid the \$400 to the Metropolitan National Bank, and filed its claim against the assignee for the sum of \$400, and alleged that the deposit was a special one for the express purpose of meeting the draft it had made on the Bank of Kildare, and asked to be paid as a preferred creditor. The assignee resisted that portion of the demand which sought to have the deposit declared a special deposit, and paid as a preferred claim. The case was tried to the court, and a demurrer sustained to plaintiff's evidence, and judgment rendered denying the application of the Bank of Blackwell to be made a preferred creditor. From this judgment the plaintiff in error, the Bank of Blackwell appeals.

There is but one question presented by the record for our consideration, *viz.* whether the deposit of the \$400 made by the Bank of Blackwell in the Bank of Kildare was a general or a special deposit. If the deposit was a general one, then the relation of debtor and creditor existed at the time of the failure of the Bank of Kildare, and the judgment of the district court must be affirmed. The evidence in relation to this particular question is to the effect that some months prior to the transaction in question the cashier

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of the Bank of Blackwell drew a draft on the bank of Kildare, where it had no funds to its credit, and at the same time wrote and sent the following letter: "Aug. 26. Bank of Kildare, Kildare, Okla.—Dear Sir: I have just been to the telephone, and made an unsuccessful attempt to call you up, but could get no response from your office. I have run pretty short of exchange, but I have more currency than I have any use for. Therefore I take the liberty of shipping you \$1,000.00 cy., and I draw on you for a like amount. I have been informed that, owing to wheat shipments, that all the banks along the R. R. are having to ship in currency daily. Hence I trust this will be in your favor, and an accommodation as well as to ours. However, should it not be such, you can return the cy. at our expense, and, when our draft reaches you, protect the same by drawing back on us for a like amt. Let me hear from you, as I may often accumulate currency, being located away from the R. R. Yours, truly, M. E. Richardson." It seems this letter was not answered, but the money was accepted, and draft paid. The Bank of Blackwell continued to make drafts on the Bank of Kildare at various times and in divers sums, and each time made a remittance of the amount of the draft. The funds were usually sent by the mail carrier as a messenger, who receipted to the Bank of Kildare for the amount, and took a deposit slip from the Bank of Blackwell. No other contract or agreement existed between the banks than such as the law would imply from the above letter and their business transactions, and no directions were given other than those contained in said letter.

It is contended up the Bank of Blackwell that each remittance constituted a special deposit for the express purpose of meeting its own draft, and that no general deposit was ever made by it in the Bank of Kildare. A long list of authorities are cited by plaintiff in error in support of its contention, some of which are applicable to the question here involved, while others relate to questions where the relation of principal and agent, or

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trustee and *cestui que trust*, exist, and not that of depositor and depositary. The rules of law governing the relation of depositors and banks of deposit are well settled, and the only difficulty lies in the application of these rules to a given state of facts. Deposits in a bank are either general or special, and the rights and liabilities of the parties with respect to the two classes are entirely different. A general deposit is one which is to be repaid, on demand, in money. A special deposit is one in which the depositor is entitled to the return of the identical thing deposited. A deposit will always be deemed to be general, unless made special by contract. 3 Am. & Eng. Enc. Law, p. 828. *Prima facie*, every deposit is general. *Brahm v. Adkins*, 77 Ill. 263. One of the leading cases on this question, the law of which has been generally approved and adopted by the American courts, is *Foley v. Hill* (in the house of lords) 2 H. L. Cas. 28, in which LORD CHANCELLOR COTTENHAM said: "Money, when paid into a bank, ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similiar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker. It is then the banker's money. He is known to deal with it as his own. He makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases. He is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it into jeopardy. If he engages in a hazardous speculation, he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to

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repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of the banker and customer. That being established to be the relative situation of the banker and customer, the banker is not an agent or factor, but a debtor." The statements of LORD COTTENHAM received express approval by the supreme court of the United States in *Bank v. Millard*, 10 Wall. 152, 19 L. Ed. 897. MR. JUSTICE DAVIS in that case said: "It is no longer an open question in this court, since the decision in the cases of *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785, and of *Thompson v. Riggs*, 5 Wall. 663, 18 L. Ed. 704, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by LORDS COTTENHAM, BROUGHAM, LINDHURST, and CAMPBELL in the house of lords, in the case of *Foley v. Hill*, 2 H. L. Cas. 28; and they all concurred in the opinion that the relation between a banker and customer who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect." In a note to the case of *In re Franklin Bank*, 1 Paige, 249, reported in 19 Am. Dec. 413, the authorities on this question are collated, and the law correctly stated. The exceptions to the general rule that when deposits of money are made in a bank the

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title passes to the bank are those cases in which the bank becomes bailee or agent of the depositor, the title to the thing deposited remaining in the depositor. Of this latter class is the case of *Peck v. Ellicott* (Kan. Sup.) 1 Pac. 499, cited by plaintiff in error. Peak executed his note to the bank for a loan of \$782.50. Before the note fell due the bank assigned the note to another party. Afterwards, at the request of the cashier of the bank that he should pay the note, and upon his promise to send and get the note, Peak delivered to the cashier the amount of the note before it was due, and the cashier executed a receipt for said sum in payment of the note; but the bank failed to pay the note or any part thereof, and appropriated the money to its own use. It was held that the relation of principal and agent existed; that Peak did not deposit the money in the bank, but delivered it to the cashier in payment of his note, and the bank was his agent to make the payment; that the money did not become the property of the bank; and that, as the agent had mixed the money with its own funds, it could be followed, and a like amount recovered. The other cases cited by plaintiff in error are either of the same class, or of cases where it was found that the bank was a trustee of the owner of the funds, and the relation of trustee and *cestui que trust* was found to exist, and the relation of debtor and creditor did not arise. There is still another class of special deposits, where the article deposited is placed in the custody of the depositary, but the control is retained by the depositor, by means of individual boxes or safety vaults within the general depository. As a general rule, in case of a special deposit, the depositary undertakes to keep and return the identical thing deposited. If it is sealed up, he cannot open it. If it is money, he has no right to use it or open an account with the depositor, but must lay away the very identical coins or bills deposited, and return or deliver them according to the stipulations of the depositor.

In determining whether the transactions between the Bank of Blackwell and the Bank of Kildare constituted a special or

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a general deposit, the foregoing general rules must be kept in view. The bank of Blackwell was short on exchange. It had an excess of currency. By reason of certain conditions of trade, and the demands upon banking facilities, the cashier thought the conditions were the reverse with the Bank of Kildare. He thought it was in need of currency, and was having to ship it. He thought to confer a mutual benefit by transmitting currency to the Bank of Kildare, and using its credit for purposes of exchange. To accomplish this he drew drafts on the Bank of Kildare, payable to order of his own bank, and sent them currency to meet the drafts as they were returned for payment in the course of business. How could this benefit the Bank of Kildare, if it could not use this currency, or take any account of it on its books? Was the Bank of Kildare to allow the Bank of Blackwell to use its credit, and permit it to check on it when it had no funds to draw against, and then lay away in a private drawer the money sent to meet the draft, and, when the draft came in, send this identical money to the holder of the draft in payment of it? We do not understand that banks are organized for such purposes, or loan their credit in such way, for accommodation, without any reciprocal benefits. When the Bank of Blackwell made its draft of \$400 on the Bank of Kildare, it had no funds on deposit in that bank. Such draft constituted an overdraft. It then made a deposit with the bank to cover the overdraft and to supply the fund to its credit, against which it had drawn, and which, under ordinary rules of business, should have been on deposit before it drew the draft. Otherwise, the Bank of Kildare was doing business for the Bank of Blackwell at its own expense, and without any reciprocal benefits. The burden was on the Bank of Blackwell to show, by evidence clear and satisfactory, that its deposit of \$400 was not made in the ordinary course of banking business; that it was made as a special deposit, under express stipulations or directions which took it out of the ordinary and general rules or usage. This it failed to prove. The deposit having been made in the ordinary and usual mode of making depos-

Same—Presump-
tions.

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its between banks doing business with and for each other, the law will presume that the deposit was a general one, until the contrary is established by competent proof. It cannot be inferred from such unsatisfactory proof as was made in this case. If persons desire to make their deposits special, and take them out of the ordinary and usual course of business, they must expressly stipulate or direct to that effect. In the case at bar no such express stipulations were entered into, and no such express directions given. The Bank of Blackwell is a general creditor of the Bank of Kildare, and is only entitled to share *pro rata* with other general creditors. The judgment of the district court is affirmed, at costs of plaintiff in error. All the justices concur, except HAINER, J., who tried case below, not sitting.

Bank's Relation
to Depositor.

Same—Insol-
vency of Bank—
Priority.

FIRST NAT. BANK OF POCATELLO

v.

C. BUNTING & CO. *et al.* (BINGHAM COUNTY *et al.*, INTERVENERS.)

(*Supreme Court of Idaho, Jan. 27, 1900.*)

Deposit of Public Money Trust Funds—Appointment of Receiver.*—Public moneys deposited in a bank in violation of law are trust funds, do not become the property or assets of such bank, and remain trust funds, with title in the true owner, after the appointment of a receiver and insolvency of the bank. *State v. Thum* (Idaho) 55 Pac. 858, 1 Banking Cases 481, affirmed.

Same—Estoppel.—A county whose funds have been unlawfully deposited in a bank is not estopped from claiming such funds as a trust fund by reason of its treasurer having received a *pro rata* payment thereon in common with general creditors.

Right of Receiver to Appeal.—A receiver has no right to appeal from an order or judgment made in the action in which he is ap-

*See *State ex rel. Anderson v. Thum* (Idaho), 1 Banking Cases 481, and *notes*.

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pointed, without permission of the court appointing him, when he has no personal interest in such order or judgment; and, if he does so, the appeal should be dismissed at his personal cost, and without cost to the estate in his hands.

(Syllabus by the Court.)

APPEAL by receiver from Bingham county district court.
Affirmed.

E. E. Chalmers, for appellant.

W. E. Borah, for respondent Custer county.

N. H. Clark, for respondents Bingham and Fremont counties.

QUARLES, J. This action was commenced by the First National Bank of Pocatello, a corporation, plaintiff, against C. Bunting & Co., bankers, a corporation, defendant, to recover a debt due from the defendant to the plaintiff. The defendant corporation being insolvent, C. E. Thum was appointed the court's receiver, to take charge of the assets of said defendant corporation, which, after qualifying, he proceeded to do. The state of Idaho intervened, alleging that said receiver took charge of, and was in possession, as receiver, of, certain moneys owned by the state, and withheld and refused to pay same to the state, and demanded an order directing said receiver to pay over to the state treasurer the said moneys of the state before distribution among the creditors of the said insolvent. The district court decided the contention against the state, and the state appealed to this court. Upon said appeal we held that public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank, and in case of the insolvency of the bank its receiver must treat such fund as the property of the true owner, and that creditors of such bank were not to share *pro rata* in public money deposited in such bank. See *State v. Thum* (Idaho) 55 Pac. 858. After the said decision the respondents here, Bingham county, Custer county, and Fremont county, each intervened in this action; claiming, each for itself, that pub-

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lic money belonging to it was deposited with the defendant corporation, and thence came into the hands of said receiver. Upon a hearing of said petitions in intervention, the court rendered and made its several judgments ordering and directing said receiver to pay each of said respondent counties the public moneys belonging to each which were deposited with said bank, as follows, to wit: To Custer county, the sum of \$12,241.02; to Bingham county, the sum of \$35,647.86; to Fremont county, the sum of \$3,627.67; and to Bingham county, on relation of E. P. Coltman, sheriff, etc., the sum of \$1,326.26. Each of said judgments directed said receiver to pay said amounts, respectively, to said counties forthwith; but, instead of doing so, said receiver, without regard to said judgment, and without regard to the decision of this court in *State v. Thum*, cited *supra*, has appealed to this court from each of said judgments. The position of each of the respondent counties is the same as was that of the state, and the decision in that case is conclusive of the merits of these four appeals, which have been argued, submitted, and considered together; and on the authority of the decision in *State v. Thum* (Idaho) 55 Pac. 858, which is hereby affirmed, each of said judgments must be affirmed.

We feel it unnecessary to add anything to what was said in *State v. Thum*, so far as the main contention before us is concerned. But it is contended by the receiver that inas-

Deposit of Public
Money—Trust
Funds—Appoint-
ment of Receiver.

much as the treasurer of Bingham county received a dividend or *pro rata* payment, the same as an ordinary creditor, from the receiver, it is estopped to claim that the public money which it had in said bank is a trust fund. To this we say that such act of the treasurer does not estop the county from claim-

Same—Estoppel.

ing such money as a trust fund. By receiving such *pro rata* payment, the treasurer does not affect the rights of the county to any greater extent than he does by assuming to make a general deposit for the purpose of transferring the title of the fund from his principal without its

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consent, and in violation of law. By neither of said acts can a county official create the relation of debtor and creditor between the public and the bank. Hence, the public money of Bingham county deposited in said bank was a trust fund, and so remained after the receivership.

We now come to a question which is not discussed in the briefs, but apparent upon the record, and which we feel it our duty to notice; and that is the fact that these four appeals are prosecuted by the receiver without an order of court permitting him to do so. It should be borne in mind that this is not an action against the receiver, but that in this action the receiver was appointed. Then the receiver has no personal interest in the judgments from which he appeals. It is of no personal interest to the receiver whether he pays the money mentioned in the several judgments to the respondent counties, or whether he pays them to the general creditors. It was his duty to obey the orders of the court appointing him, of which he is only an agent. He had no right to appeal from said orders. The law upon this point is tersely stated by Mr. High on Receivers, in section 264, where, *inter alia*, it is said: "But, since he is the mere servant or agent of the court, he will not be allowed of his own volition to appeal from an order made in the progress of the cause in which he is appointed. When, therefore, without authority of the court he prosecutes such an appeal, it may be dismissed on motion." The appellate court should dismiss such an appeal of its own motion. In view of the decision in *State v. Thum*, cited *supra*, the action of the receiver and of his attorney in bringing these appeals here savors somewhat of contempt. Every question raised here is disposed of in *State v. Thum*, and there settled. Hence it is apparent that these appeals are not prosecuted in good faith, but for the purpose of delay. Under the circumstances of this case, the burden of taking these appeals, including all costs and attorney's fees, must not be borne by or imposed upon the insolvent estate, but the receiver must pay all costs of this appeal.

Right of Receiver
to Appeal.

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personally; and the attorney for the receiver upon these appeals must look to the receiver personally for such fees, if any, as he may be entitled to, and no part of the same must be allowed against the estate in the hands of said receiver. Each of the judgments appealed from is affirmed, with costs to respondents, and it is ordered that *remittitur* herein be forthwith issued by the clerk of this court, directed in the usual form.

HUSTON, C. J., and SULLIVAN, J., concur.

COLTON *et al.*

v.

DOVER PERPETUAL BUILDING AND LOAN ASS'N OF BAL-
TIMORE.

(*Court of Appeals of Maryland, Nov. 24, 1899.*)

Deposits—Insolvency of Bank—Demand.*—Where the bank is insolvent a depositor may maintain a suit for his deposit without making a previous demand therefor.

Insolvent Bank—Receivers—Deposits—Set-Off.*—At common law a depositor may set-off the balance due on his deposit account against his note to the bank in the possession of its receiver, even though the note did not mature until after the insolvency of the bank, and no demand had been made for the deposit. And this rule is not changed by the statutes of Maryland.

APPEAL by receivers from city of Baltimore circuit court.
Affirmed.

Argued before MCSHERRY C. J., and PAGE, PEARCE,
FOWLER, BOYD, and SCHMUCKER, JJ.

Wm. S. Bryan, Jr., and Martin Lehmayor, for appellants.

L. P. Henninghausen and P. C. Henninghausen, for appellee.

*See notes at end of case.

· Colton v. Dover Perpetual Building & Loan Ass'n

BOYD, J. A bill was filed in the court below against the South Baltimore Bank, a corporation of this state, on the 24th day of February, 1898, asking for the appointment of a receiver, and that the bank be declared insolvent. Case Stated. An answer was filed the same day, admitting that the bank was insolvent, and consenting to the appointment of a receiver. One of the appellants was appointed on that day, and afterwards the other was appointed co-receiver. On the 1st day of June, 1898, a decree was passed adjudicating the bank insolvent, and determining it was so when this bill was filed. The receivers proceeded with the discharge of their duties, and in due course the case was referred to the auditor to state an account distributing the assets of the bank. When the bill was filed, the bank held a promissory note of the appellee for \$1,000, which became due on March 2, 1898, and the appellee had a deposit with the bank of \$357.25. At the maturity of the note the appellee tendered the receiver then in office the sum of \$642.75 in payment of said note, claiming the amount of the deposit as a set-off, and demanded the note, but the receiver refused to accept that amount. Subsequently that sum was accepted, under an agreement that it should be credited on the note, without prejudice to the receiver's claim for the balance, and that no suit should be instituted until it was determined whether the appellee was entitled to set off the deposit against the balance due on the note. The auditor refused to allow the set-off, but distributed to the appellee its proportion dividend as a creditor. Exceptions were filed to the audit, which were sustained, and a decretal order was passed directing the receivers to allow the association the deposit as a set-off against the balance due on the note. From that order this appeal was taken by the receivers, with the permission of the court; it being represented that there were a number of other claims that would be affected by the decision. The question, therefore, to be determined by us, is whether the appellee is entitled to set off the amount of its deposit with the bank at the time of its failure against the

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balance due on the note, under the circumstances we have stated. Several reasons have been assigned by the appellants in support of the position that the appellee is only entitled to receive a distribution on the amount of the deposit, as other creditors are.

1. One ground relied on at the argument was that a depositor in a bank cannot maintain a suit for his deposit unless he has previously made a demand for it, and that no demand was made in this case. "It is now perfectly well settled that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor." *Hardy v. Bank*, 51 Md. 585. And it is equally well settled that a depositor cannot, as a general rule, maintain an action to recover his deposit until he has first made a demand for its payment. 3 Am. & Eng. Enc. Law (2d Ed.) 838. But, while that is true, there may be circumstances under which no demand is necessary prior to bringing suit; and, on page 839 of the volume of the *Encyclopedia of Law* above referred to, it is said that "where the bank has suspended, or where for any other reason it would be manifestly futile to make demand, none need be made." In the case of *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 Gill. & J. 449, it was held that the necessity for a demand would be dispensed with by the suspension of specie payments and discontinuance of banking operations by the bank, provided those acts were known to the plaintiff, and from the time of such knowledge the statute of limitations would begin to run. It would have been "manifestly futile to make demand" on the bank or the receiver for the amount of deposit; and, if the appellee had sued, the fact that a demand was not previously made would not have defeated the action. If the bank had not failed, and had sued the appellee for the amount of the note, it would not have been necessary for the latter to have proven a demand for the deposit prior to the time suit was instituted by the bank. A defend-

Deposits—
Insolvency of
Bank—Demand.

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ant can set off against a plaintiff's demand a note of the plaintiff which matured after the commencement of the action. *Clarke v. Magruder*, 2 Har. & J. 77. As early as *Whittington v. Bank*, 5 Har. & J. 489, our predecessors held that the defendant in an action by a bank on a promissory note against him may set off against the claim of the bank any money he has in bank, and it is not intimated that a previous demand was necessary in order to enable him to do so. The bank being a debtor to the depositor, the right to set off such deposit is within the very terms of our statute; and hence in a suit by the bank the claim for the deposit can be set off, although no previous demand for it has been made. That being so, it would seem to be clear that no demand would be necessary in order to enable the defendant to set off the amount of the deposit against a claim made by the receiver of the bank, if there be no other reason for not allowing it. In *Morse, Banks*, § 338, it is said: "Where the bank itself stops payment and becomes insolvent, the customer may avail himself, in set-off against his indebtedness to the bank, of any indebtedness of the bank to himself,—as, for example, the balance due him on his deposit account. So, also, even though the debt to him has not matured at the time of the insolvency." This may be done whether a demand had or had not been previously made. *Fort v. McCully*, 59 Barb. 87; *Seymour v. Dunham*, 24 Hun, 93.

2. We come then to the main question in the case. It is argued that to allow the set-off would be, in effect, to give the appellee a preference over the other creditors of the bank, and that it is the duty of the receivers to distribute the assets *pro rata*, and not to pay in full any one creditor. If the appellee was merely a creditor, that argument might prevail, but that was not the relation that existed between the two. The appellee was not only a creditor to the amount of its deposit, but it was a debtor to the amount of the note held by the bank. Its debit was larger than its credit, and, if the bank had not failed, it could only have recovered the difference between

Insolvent Bank—
Receivers—
Deposits—Set-Off.

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the two. Do the receivers occupy any better position? The general rule undoubtedly is that a receiver takes subject to set-offs which the defendant might have set up against the original owner. See 22 Am. & Eng. Enc. Law, 308, and *Merrill v. Granite Co.* (Mass.) 36 N. E. 797, 23 L. R. A. 313, note, where many authorities are collected. There are some exceptions to the rule, one of which may be mentioned, although not directly involved in the case, as some of the authorities cited by the appellants are to that point; and that is that a claim obtained after the commencement of the proceedings which resulted in the appointment of a receiver should not be allowed as a set-off unless there be some statute authorizing it to be done. In this case, however, the debt was due by the bank to the appellee before the proceedings under which the appellants were appointed were instituted. As we have seen, the relation of debtor and creditor existed; and the question discussed above, as to whether demand must be made before suit can be brought, does not in any wise reflect upon the question of indebtedness, but only on the right to sue for the indebtedness before demand is made. But it is said on behalf of the appellants that, inasmuch as the note fell due after the appointment of the first receiver, he took it free from all equities, just as a *bona fide* purchaser for value would have done, and that a claim in favor of the bank which did not mature until in the hands of the receiver is not subject to a set-off by a claim which existed against the bank before the receiver's rights accrued; in short, that in one case the debt is due by the bank to the customer, and in the other by the customer to the receiver. If that were strictly correct, there would be some ground for the contention; for if, for example, the appellee had purchased some property from the receiver, it would not be permitted to set off its claim against such indebtedness to the receiver, for it would thereby not only obtain an unwarranted preference over other creditors, but it would prevent a proper settlement of the insolvent estate, and, moreover, they would not be mutual claims. But when the receiver was appointed he took

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the assets of the bank, and among those assets was this note. It was a debt already incurred by the appellee, and payable to the bank when due. By reason of the fact that it was payable to and held by the bank, it was an asset that became vested in the receiver, and he took it subject to the equities existing between the appellee and the bank. Although there are some authorities to the contrary, the great weight of authority is to the effect that the fact that the claim thus held by the receiver does not mature until after his appointment does not prevent a defendant from using his claim as a set-off. Among other decisions are *Berry v. Brett*, 6 Bosw. 627; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Platt v. Bentley*, 11 Am. Law Reg. (N. S.) 171; *In re Hatch*, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664; *Bank v. Balliet*, 8 Watts & S. 311; *Aldrich v. Campbell*, 4 Gray, 284; *Smith v. Spengler*, 83 Mo. 408; *McCagg v. Woodman*, 28 Ill. 84; *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; *Yardley v. Clothier*, 2 C. C. A. 349, 51 Fed. 506, 17 L. R. A. 462; *Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30. See, also, *Fera v. Wickham* (N. Y. App.) 31 N. E. 1028, 17 L. R. A. 456, note. Some of these cases make a distinction between a technical set-off in suits at law, and cross demands allowed by courts of equity; but, as we are now considering a distribution in a court of equity, all of the cases can properly be referred to here.

3. But it is contended by the appellants that if it be conceded that the general rule is as we have stated, about the rights of the receivers, they occupy a different position, by reason of our statute. Section 264a of article 23, c. 349, Acts 1896, provides that when a corporation has been determined or proven to be insolvent and dissolved, in accordance with section 264, "all of its property and assets of every description shall be distributed to the creditors of said corporation in the same manner that the property and assets of an insolvent debtor are distributed under the provisions of article 47 of the Code.

* * * And the date of the filing of the bill against such

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corporation, upon which it may be dissolved, shall be taken and treated for the purpose of determining the validity of preferences and for all other purposes as the date of the filing of the petition in insolvency by or against a natural person." In short, receivers of corporations that are dissolved under that statute are placed on the same basis as trustees in insolvency of natural persons, and the date of filing the bill is the time fixed to determine the status of the parties affected by it. But section 11 of article 47 of the Code provides that "the estates of the insolvent shall be distributed under the order of the court according to the principles of equity." While set-off in equity is generally governed by the same principles as at law, courts of equity sometimes allow a set-off where for some technical reason it could not be allowed at law. The insolvency of the party against whom it is claimed frequently affords equitable ground for allowing it. A technical set-off is wholly of statutory origin, but courts of equity exercise an original jurisdiction over the subject, and will, when reason and justice require it, enforce a counterclaim, though not within the letter of the statute. *Smith v. Donnell*, 9 Gill, 84, and *Manning v. Thruston*, 59 Md. 218, are instances of such equitable relief. It would sometimes work great injustice to customers of banks if they should be required to pay in full their indebtedness to the bank, and only receive a dividend on their deposits. A customer might from time to time make deposits in bank with a view to meet his note held by it, and it would manifestly be a great hardship, if, under those circumstances, he could not apply his deposit towards the payment of the note, because the bank had failed and a receiver had been appointed. A court of equity would certainly not permit such unjust results in the distribution of funds before it, if such facts were proven; and, although in this case there is no evidence that the deposit was made with special reference to the maturity of the note, yet, as it became due a few days after the receiver was appointed, it might well be inferred that the appellee had that fact in view

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in making the deposits. If the bank had not failed, it could have applied the deposit of the appellee towards the payment of the note. 3 Am. & Eng. Enc. Law (2d Ed.) 828, 835; *Miller v. Bank*, 30 Md. 392. And it would be unreasonable to permit a receiver of an insolvent bank to collect the note in full, without allowing the set-off, particularly as the bank had a lien on the deposits. "The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature, by applying the debtor's deposits upon them, thus setting the two off against each other." 3 Am. & Eng. Enc. Law (2d Ed.) 835; *Miller v. Bank*, *supra*. If the appellee was not financially responsible, and had attempted to assign its claim for deposits against the bank to a third person, could there have been any question about the right of the receiver to insist upon the application of the deposit to the payment of the note? Clearly not, as the assignee of the claim would have taken it subject to equities existing between the appellee and the bank, and a court of equity would have protected the bank or its representatives, the receivers. *Marshall v. Cooper*, 43 Md. 46. It would seem clear, then, that at least in equity the deposit should be allowed as a counterclaim or set-off. But even at law it should be allowed against the receivers. It is true that a trustee appointed under our insolvent laws does not occupy precisely the same position that an ordinary trustee under a conventional deed of trust does, as he has greater powers, and represents the creditors. He can, for example, have a deed made by the insolvent in fraud of his creditors set aside, which an assignee under a voluntary deed of trust cannot do, because the latter can only do what his assignor could. But the insolvent law does not vest him with such powers as would enable him to collect more than is actually due the insolvent, and there was only actually due the balance between the two accounts. "All the property of every description, rights and claims of the insolvent," vest in the trustee; and, if the insolvent has disposed of any

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of his property in violation of the insolvent law, it is void, and the trustee can recover it. It could not be successfully contended that the creditors of an insolvent could deprive one who owes the insolvent of the right of set-off, and how can the trustee who represents them do so? Nor can he avoid the right of set-off on the theory that he occupies the position of a *bona fide* purchaser for value. Haxtun v. Bishop, 3 Wend. 13, referred to by the appellants, tends to sustain that position, but that case has not met with approval. See (N. Y. App.) 31 N. E. 1028, 17 L. R. A. 458, note. In Dowler v. Cushwa, 27 Md. 354, this court quoted with approval from Van Wagoner v. Gaslight Co., 23 N. J. Law, 291, that: "The rule pervades both bankrupt and insolvent laws, founded on general principles of equity, that all cross demands, whether connected or independent, provided they be mutual, as between the bankrupt or the insolvent and the creditor, shall be set off, and the balance only shall be deemed the indebtedness on one side or the other. The assignees take a bankrupt's property in the same condition, and subject to the same burthens, as the bankrupt himself held it, on the principle that they are not purchasers for a valuable consideration, but as voluntary assignees and personal representatives, and are therefore distinguished from particular assignees." Although fully recognizing the distinction between the trustee of an insolvent and one appointed by the debtor in a deed of trust, as made by this court in previous cases, we cannot adopt the view urged upon us, that the former is to be regarded as a *bona fide* purchaser for value of the assets that come into his hands, and thereby permit him to deprive a debtor of such a right as that to set off a debt due by the insolvent prior to the institution of the insolvent proceedings; and we find nothing in our statute, or in the authorities we feel called upon to follow, to cause us to reach a conclusion that in our opinion would work such manifest injustice. It is not claimed that a receiver appointed under the statute referred to can occupy any better position than an insolvent

Notes

trustee, and, for the reasons we have given, we will affirm the order of the court appealed from. Order affirmed; the costs to be paid out of the insolvent estate.

NOTES.

Demand by Depositor Prior to Bringing Action against Insolvent Bank.—Where a bank has suspended payment and closed its doors, and refuses to admit its creditors, demand is not a necessary prerequisite to an action by a depositor to recover his deposit. *Scott v. Armstrong*, 146 U. S. 499; *Arnold v. Hart*, 75 Ill. App. 165; *Planters' Bank v. Farmers', etc., Bank*, 8 Gill & J. (Md.) 449; *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217, 41 Am. Dec. 500; *Cooper v. Mowry*, 16 Mass. 7; *Thruston v. Wolfborough Bank*, 18 N. H. 391, 45 Am. Dec. 382. See also *Brahm v. Adkins*, 77 Ill. 265.

Set-off against Receivers.—The receiver of an insolvent corporation occupies the same position in regard to the right of set-off as the corporation did before insolvency and takes possession subject to that right. *Darby v. Freedman's Sav. & T. Co.*, 3 McArth. 349; *Scott v. Armstrong*, 146 U. S. 499, *reversing* 36 Fed. Rep. 63; *Naglee v. Palmer*, 7 Cal. 543; *McCagg v. Woodman*, 28 Ill. 84; *Cook v. Cole*, 55 Iowa. 70; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351; *Com. v. Phoenix Bank*, 11 Met. (Mass.) 129; *Com. v. Shoe, etc., Ins. Co.*, 112 Mass. 131; *Colt v. Brown*, 12 Gray, 233; *Cox v. Volkert*, 86 Mo. 505; *State Bank at New Brunswick v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. 266; *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Osgood v. De Groot*, 36 N. Y. 348; *Platt v. Bently* (N. Y.), 11 Am. L. Reg., N. S., 171; *Re Van Allen*, 37 Bard. 225; *Miller v. Franklin Bank*, 1 Paige, 444; *McLaren v. Pennington*, 1 Paige, 102; *Mel. v. Holbrook*, 4 Edw. Ch. 539; *Holbrook v. American F. Ins. Co.*, 6 Paige, 220; *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444; *In re Middle Dist. Bank*, 1 Paige (N. Y.) 585; *Berry v. Brett*, 6 Bosw. (N. Y.) 627; *New Amsterdam Sav. Bank v. Tartter*, 54 How. Pr. (N. Y.) 385; *Smith v. Fox*, 48 N. Y. 674; *Smith v. Felton*, 43 N. Y. 419; *Jones v. Robinson*, 26 Barb. 310; *Hughitt v. Hayes*, 136 N. Y. 163; *Davis v. Industrial Mfg. Co.*, 114 N. Car. 321, 23 L. R. A. 322; *Hade v. McVay*, 31 Ohio St. 231; *Armstrong v. Warner*, 49 Ohio St. 376, 17 L. R. A. 455; *Chase v. Petroleum Bank*, 65 Pa. 169; *Penn. Bank v. Farmers' Deposit Nat. Bank* (Pa. 1889), 20 Atl. Rep. 150; *Farmers Deposit Nat. Bank v. Penn. Bank*, 2 L. R. A. 273, 123 Pa. 283; *Clarke v. Hawkins*, 5 R. I. 219; *Kinsler v. Pope*, 5 Strobb. (S. Car.) 120; *Terry v. Wooding*, 2 Patton & H. (Va.) 178.

Schofield *v.* Goodrich Bros. Banking Co

SCHOFIELD

v.

GOODRICH BROS. BANKING CO.

(*Supreme Court of Appeals, Eighth Circuit, Oct. 23, 1899.*)

Bank Purchasing Stock in Other Corporation—Ultra Vires—Stockholder's Liability—Estoppel.*—It is *ultra vires* of a banking corporation, upon which has been conferred only the power to do a banking business, to purchase stock in another corporation merely as an investment, and such a purchase cannot be validated by estoppel, so as to render the bank liable as a stockholder.

Federal Courts—Following State Decisions.—Federal courts will follow state decisions in construing and applying state statutes conferring and limiting corporate powers.

State Banks — Powers — State Statutes. — The act of 1889 of Nebraska, enacted for the purpose of regulating, and restricting, the powers already conferred upon state banks, did not confer upon the defendant bank authority to purchase stock in another corporation merely as an investment.

ERROR to the circuit court of the United States for the district of Nebraska.

W. A. Moore (*Earl M. Cranston and Robert J. Pitkin*, on the brief), for plaintiff in error.

J. W. Deweese (*John Heasty*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action by the receiver of a national bank to enforce a stockholder's liability, under section 5151 of the Revised Statutes. The defense is that the purchase of the stock was *ultra vires* of the state bank, the alleged stockholder. The material facts are these: The Union National Bank of

Case Stated.

*See generally *First Nat. Bank of Concord, N. H., v. Hawkins* (U. S.), 1 Banking Cases 635, and *notes*, 644.

Schofield v. Goodrich Bros. Banking Co

Denver is a corporation organized under the national banking laws, and the plaintiff in error, John W. Schofield, is its receiver. The defendant in error, the Goodrich Bros. Banking Company, is a banking corporation which was organized under the laws of the state of Nebraska in 1886. The statutes under which it was organized were general in their terms. They allowed any number of persons to become incorporated for the transaction of any lawful business by the adoption and filing of articles of incorporation, and the publication of a notice, among other things, of the general nature of the business of the corporation. Comp. St. Neb. 1899, §§ 1826, 1829, 1833, 1834. The supreme court of Nebraska, in construing these laws, has held, in accord with the general current of authority, that the enumeration of its powers by a corporation in its articles of incorporation, under these statutes, is the exclusion of all other powers. *State v. Railroad Co.*, 24 Neb. 162, 38 N. W. 43. The only powers secured to the defendant in error were those obtained by the use in its articles of these words: "The general nature of the business to be transacted by the corporation is banking in all its various forms and branches." In 1889 the legislature of the state of Nebraska enacted a statute for the purpose of obtaining information relative to the financial standing of banks in that state, which required them to report to the state auditor, among other things, "the amount loaned upon bond and mortgage, the par value and actual market value of all stock or bond investments, designating each particular kind and the amount invested in each." Consol. St. Neb. 1891, p. 132, § 294. Between 1889 and 1895 the defendant in error obtained, partly by subscription and partly by purchase, the 20 shares of the stock of the Union National Bank upon which this action is based, and received six dividends, which amounted in the aggregate to \$585. None of this stock was taken by the state bank as security for or in payment of any loan made by it or indebtedness to do it, but it was all subscribed for or bought by the defendant in error as an investment. Upon this state of

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facts, the court below rendered judgment for the defendant in error, and counsel for the receiver insists that this was error, because the purchase of the stock by the state bank was not beyond its powers, and because, if it was, that bank was estopped from defending on that ground by the fact that it permitted itself to appear as a stockholder on the books of the National Bank, and received dividends on its stock for years, while that bank was incurring its liabilities to the creditors whom the receiver now represents.

Both the questions which the plaintiff in error presents have been decided by the supreme court of the United States, and by the supreme court of the state of Nebraska, and those decisions are controlling authority upon these questions in this court. It would therefore be futile for us to consider or discuss them. Each of these courts has held that the purchase of the stock of another corporation as an investment, and not as security or in payment of a debt, by a corporation simply empowered to transact a banking business, is beyond its powers, and void, and that, since such a purchase is *ultra vires* and void, it cannot be made or validated by estoppel. *Bank v. Kennedy*, 167 U. S. 362, 366, 371, 17 Sup. Ct. 831; *Bank v. Hart*, 37 Neb. 197, 201, 206, 55 N. W. 631.

Bank Purchasing
Stock in Other
Corporation—
Ultra Vires—
Stockholder's
liability—
Estoppel.

The decision of the supreme court of Nebraska is a construction of the statutes of that state under which the defendant in error is organized, and it is an elementary principle that the federal courts will construe and apply such statutes as they are interpreted by the highest judicial tribunal of the state which enacts them, when no question of general or commercial law and on right under the national constitution or laws is involved. There is no class of cases where they follow, and for obvious reasons ought to follow, the decisions of the state courts more implicitly than that in which these courts define and limit the powers of corporations created under the statutes of their respective states. What a medley of contradiction, confusion, and conflict would result if such corporations

Federal Courts—
Following State
Decisions.

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could exercise powers under the decisions of the national courts which are denied to them by the courts of their respective states. The decision in *Bank v. Hart* is therefore binding authority in this court in the case in hand. *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, 27 U. S. App. 528, 536; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 77, 82 Fed. 124, 128, 49 U. S. App. 523, 534; *Id.*, 19 Sup. Ct. 341, 344.

The contention that this decision is inapplicable because the purchase of the stock under consideration in that case was made before the act of 1889 was passed, while the subscription and purchase here in question were negotiated after the passage of that act, cannot be successfully maintained. The defendant in error was incorporated in 1886, before that law was enacted, and its rights and powers were granted and limited by the statutes of Nebraska and the law of the land at that time. Under the decision to which we have adverted, these powers did not include the right or authority to purchase as an investment, either directly or by estoppel, the stock of another corporation. The act of 1889 did not grant that power to this corporation. It was neither the purpose nor the effect of that law to add to or enlarge the powers of banking corporations, but it was enacted for the sole purpose of regulating, controlling, and restricting the exercise of the powers already given. The provisions which it contains, to the effect that these corporations must report to the state auditor the value of all their stock and bond investments, gave them no power to make such investments which the general statutes and the common law had not already granted to them, but its effect was clearly limited to the general purpose of the act, and that was to simply call for information relative to the financial standing of the banks of the state under the powers theretofore granted to them. The construction given by the supreme court of Nebraska to the charters of banks organized under the statutes of that state prior to

State Banks—
Powers—State
Statute.

State *v.* Darragh

1889 is therefore conclusive in this case, and it is in accord with the interpretation given by the supreme court to the franchises conferred upon national banks in similar terms by the acts of congress. The judgment below is sustained by the opinions of the supreme court of the United States and of the supreme court of the state of Nebraska, and it is accordingly affirmed.

STATE

v.

DARRAGH.

(*Supreme Court of Missouri, Dec. 5, 1899.*)

Statute Making Reception of Deposits a Crime—Special Legislation.*—The statute of Missouri making it a crime for any bank officer to receive or assent to the reception of deposits after the bank is insolvent or in failing circumstances is not in violation of a constitutional provision against special legislation.

Same—Class Legislation.—Nor is such statute within the inhibition of section 1 of the fourteenth amendment to the federal constitution, which forbids any state to deny to any person within its jurisdiction the equal protection of the laws, as it applies to all persons of a class.

Harmless Error.—A judgment will not be reversed for harmless error.

Banks—Failing Circumstances.—A bank is in failing circumstances when it is unable to meet the demands of its depositors in the usual course of business, and this is true even though there is at the time a stringency in the money market.

Same—Same—Knowledge of Officer—Presumptions.—Such statute makes the failure of the bank *prima facie* evidence of knowledge on the part of its officer receiving or assenting to the reception of a deposit that it was in failing circumstances at the time of the deposit, and such presumption will prevail unless rebutted, or the contrary proved.

Harmless Error.—Harmless error is not reversible error.

Evidence—Statements of Defendant.—In the prosecution of a bank officer under such statute, the legal presumption is that statements

*See note at end of case.

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made by defendant against himself are true; but the jury are not bound to believe his statements in his own favor, but may consider them in the light thrown upon the case by its other facts and circumstances.

Instructions.—Where an instruction is substantially correct, and not calculated to mislead the jury, the fact that it may be open to criticism from the standpoint of a lawyer is not material.

Evidence—Previous Good Character.—In such a proceeding, the jury must consider the evidence in relation to defendants' character for honesty and veracity, but previous good character cannot excuse or mitigate such an offense.

Market Values—Hearsay Evidence.—Testimony as to market values may be admissible although the witnesses' opinions were formed upon hearsay.

Same—Same.—But the jury may disregard such opinions, if deemed by them to be unreasonable.

Instructions.—It was reversible error to refuse to give a requested instruction upon the application of a rule of evidence prescribed by statute for such cases the contention that it was properly refused because its substance could be spelled out from certain instructions given being unwarranted, and defendant being entitled to have the rule presented to the jury in unmistakable terms.

APPEAL by defendant from Jackson county criminal court.
Reversed.

Warner, Dean, Gibson & McLeod and Gage, Ladd & Small, for appellant.

Edward C. Crow, Atty. Gen., and *Sam B. Jeffries, Asst. Atty. Gen.*, for the State.

BRACE, J. By section 27, art. 12, of the constitution, it is provided that: "It shall be a crime the nature and punishment of which shall be prescribed by law for any president, director, manager, cashier or other officer of
Case Stated. any banking institution, to assent to the reception of deposits or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, and any such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." By section 3581, Rev. St. 1889, passed in pursuance of this constitutional mandate (*State v. Kelsey*,

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89 Mo. 623, 1 S. W. 838), it is provided: "If any president, director, manager, cashier or other officer of any banking institution, or the owner, agent or manager of any private bank or banking institution doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, or if any such officer, owner or agent shall create or assent to the creation of any debts or indebtedness by any such bank or banking institution, in consideration or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution, after he shall have had knowledge of the fact that such banking institution or the owner or owners of any such private bank is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof shall be punished in the manner and to the same extent as is provided by law for stealing the same amount of money deposited, or valuable thing: provided that the failure of any such bank or banking institution shall be *prima facie* evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit." Under this section the defendant was indicted, convicted, and his punishment assessed at two years in the state penitentiary, in the criminal court of Jackson county. After an unsuccessful motion for a new trial, the case was duly appealed to this court. On the trial, exceptions were saved to the action of the court in admitting and rejecting some of the evidence, which is assigned as error.

The case was submitted to the jury on the following instructions:

"No. 1. The court instructs the jury that these instructions contain the law of this case. It is the duty of the jury to apply the proven facts of the case to the law here given, and find their verdict accordingly.

"No. 2. The court instructs the jury that if you shall believe from the evidence that the defendant, at the county

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of Jackson and state of Missouri, at any time within three years next before the 13th day of October, 1893, was the president of the Kansas City Safe-Deposit & Savings Bank, and that the same was a corporation, and doing business as a banking institution in said county and state, did then and there unlawfully and feloniously assent to the taking and receiving on deposit in said banking institution the money of Christina Voight to the amount of thirty dollars or more, and that said banking institution was then and there in failing circumstances, and that the defendant was then and there the president of said banking institution, doing business as such, and that the defendant had knowledge at the time when such deposit was received that said banking institution was in failing circumstances, you will find the defendant guilty, and assess the punishment by imprisonment in the penitentiary for any time not less than two years and not more than five years. 'Feloniously,' as used in these instructions, means wickedly and against the admonition of the law; unlawfully.

"No. 3. If the jury believe from the evidence that on July 10, 1893, the witness Christina Voight did deposit in the Kansas City Safe-Deposit & Savings Bank, a banking institution doing business in the state of Missouri, at the county of Jackson, state aforesaid, three hundred dollars, or any part thereof, of the value of thirty dollars or more, lawful money of the United States, of the money and property of the witness Christina Voight; and shall further believe from the evidence that the said deposit was not taken and received by the defendant himself, but was taken and received by some other person, but that such other person was then and there in the employ of the said Kansas City Safe-Deposit & Savings Bank, and acting under the direction and control of the defendant in said employment, and that such other person had general power and authority from the defendant to receive deposits of money into said bank, and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was there

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and then in failing circumstances,—they will find the defendant guilty as charged.

“No. 4. The court instructs the jury that a banking institution is in failing circumstances when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.

“No. 5. The court instructs the jury that the failure of the banking institution in question is *prima facie* evidence of knowledge on the part of its president that the same was in failing circumstances on July 10, 1893. The court instructs the jury that *prima facie* evidence is such that raises such a degree of probability in its favor that it must prevail unless it be rebutted, or the contrary proved.

“No. 6. The jury are instructed that in considering the condition of the bank on the 10th day of July, 1893, you will not take into account the three hundred thousand dollars of capital stock as a liability. The court instructs the jury that the indictment, of itself, is no evidence of guilt.

“No. 7. The court instructs the jury that in determining the condition of the Kansas City Safe-Deposit & Savings Bank on the 10th day of July, 1893, you should consider the reasonable market value of the assets of the bank on hand, as compared to its liabilities on that day. All consideration of the condition of the bank is confined to the 10th day of July, 1893; but you may consider any evidence that may be before you showing its condition immediately before that day, if there is any such, to aid you in determining its condition on that day.

“No. 8. In determining the guilt or innocence of the defendant, you may take into consideration all the facts and circumstances before you.

“No. 9. The court instructs the jury that it is not, of itself, a crime for the president of a bank to borrow money from the bank of which he is president; and you can consider the fact that the defendant borrowed money from the bank in

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question, if you find he was president of the bank, and did borrow money from the bank, in determining the condition of the bank the 10th of July, 1893, and for no other purpose.

"No. 10. If you believe that the money was deposited in the name of Mrs. E. Voight and Mrs. Seitzler, if you find it was so deposited, and that Christina Voight had possession and care of the same, then, for the purpose of this case, said money was the money of Christina Voight.

"No. 11. In determining the question as to the condition of the bank on the 10th day of July, 1893, you will consider the assets and their reasonable market value on that day, and without any reference to any indorsement of any of the notes made after the 10th day of July, 1893.

"No. 12. The court instructs the jury that its is no offense for an officer of a bank to assent to the receipt of a deposit by such bank when the same is in failing circumstances, if at the time of receiving such deposit the officer did not at the time know it was in failing circumstances; but in taking into consideration the question as to whether or not the bank in question was in failing circumstances on the 10th day of July, 1893, and as to whether or not the defendant had knowledge on that day of its condition, you may consider all the facts and circumstances in evidence before you.

"No. 13. The court instructs the jury that, before they can convict the defendant, they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon reasonable doubt alone, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence.

"No. 14. The court instructs the jury that the law presumes the innocence, and not the guilt, of the defendant; and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt, as defined in these instructions.

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"No. 15. The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict ; but, in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest, in the result of the case, and that he is the accused party on trial, testifying in his own behalf.

"No. 16. If verbal statements of the defendant have been proven in this case, you may take them into consideration, with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true, because against himself; but anything you may believe from the evidence that defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.

"No. 17. The jury are the sole judges of the credibility of the witnesses, and the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand ; the interest of the witness, if any, in the result of the trial ; the motives of the witness in testifying ; the witness' relation to, or feeling for or against, the defendant or the alleged injured party ; the probability or the improbability of the witness' statements ; the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony ; and the inclination of witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness

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such credit, and the testimony of each witness such value and weight, as you deem proper.

"No. 18. In determining as to the guilt or innocence of the defendant you should take into account the testimony in relation to his character for honesty, integrity, and veracity, and you should give to such testimony such weight as you deem proper; but if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse, palliate, or mitigate the offense, and you cannot acquit him merely because you may believe he has been a person of good repute.

"No. 19. The court instructs the jury that in determining the question of whether or not the Kansas City Safe-Deposit & Savings Bank was in failing circumstances on the 10th day of July, 1893, you should consider the liabilities of the bank and the reasonable market value of the assets of the bank on that day, regardless of any change, if any, or additional security, if any, which may have been given, if any, since that day. If you shall find from the evidence that any part of the assets of said bank have been proven to have a market value, then you should give such assets such intrinsic value as may have been shown by the evidence in the case, and if there be any of said assets, to wit, stocks, bonds, or negotiable paper, that have not, in your opinion, from the evidence, been shown to have a market value nor an intrinsic value, then such assets are presumed to be worth their face value. This will have no application to such assets as may have been shown by the evidence to have no value at all, provided there is such evidence as to any of the assets of said bank.

"No. 20. The court instructs the jury that under article 11 of the by-laws of the Kansas City Safe-Deposit & Savings Bank, and under the laws of the state governing savings banks, the board of directors of the Kansas City Safe-Deposit

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& Savings Bank had a right to require 90 days' notice of the withdrawal of time deposits."

To which exceptions were saved, and the giving of those numbered 3, 4, 5, 6, 9, 16, and 18 is assigned as error.

The defendant asked, and the court refused to give, the following instructions:

"No. 1. The court instructs the jury that the finding of the indictment in this case is not to be considered by you, in arriving at your verdict, as any evidence that the defendant is guilty of the crime therein charged."

"No. 4. The court instructs the jury that if you find from the evidence that any witness in this case has given an opinion as to the value of any of the assets of the Kansas City Safe-Deposit & Savings Bank on the 10th day of July, 1893, and that such opinion is based solely upon information obtained from others by means of correspondence, then you are at liberty to disregard such evidence."

"No. 10. The court instructs the jury that in determining the value of any of the assets of the Kansas City Safe-Deposit & Savings Bank on the 10th day of July, 1893, as shown on this trial, the testimony of expert witnesses who have testified before you, if deemed by you unreasonable, may be disregarded.

"No. 11. The court instructs the jury that although by the statute the failure of the Kansas City Safe-Deposit & Savings Bank is made *prima facie* evidence of knowledge on the part of the defendant that the same was in failing circumstances on the 10th day of July, 1893, yet the burden of proving the state's case is not really changed. The law enables the state to make a *prima facie* case by proof of the assenting to the creation of said indebtedness and the reception of the money into the bank; but the defendant can show the condition of the bank, and the circumstances attending the failure, and any facts tending to exonerate him from criminal liability, and then, on the whole case, the burden still rests on the state to establish defendant's guilt beyond a reasonable doubt. The presumption of innocence with which the

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defendant is clothed, and never shifts, rests with him throughout the case, notwithstanding a *prima facie* case may have been made out by the state.''

The refusal to give these instructions is complained of as error, as well as the refusal to give some others, which need not be set out, by which the constitutionality of section 3581 was called in question.

The defendant was the president of the Kansas City Safe-Deposit & Savings Bank, and the indictment is for the receipt of the same deposit, made by Christina Voight, for which Sattley, the cashier of this bank, was prosecuted and convicted. State v. Sattley, 131 Mo. 464, 33 S. W. 41, where the character, condition, and history of this bank, and of defendant's connection therewith, as well as the circumstances of the deposit, sufficiently appear for the purposes of this opinion, in which we have only questions of law to deal with.

1. It is contended by the learned counsel for the defendant that section 3581, *supra*, under which the defendant was indicted, is unconstitutional, in that it is in violation of section 53 of article 4 of the constitution of this state, prohibiting special legislation, and within the inhibition of section 1 of the fourteenth amendment to the constitution of the United States, which forbids any state to deny to any person within its jurisdiction the equal protection of the laws. This act was first passed in 1877 (Sess. Acts. p. 239), was amended and revised in 1879, and appears in the revision of that year as section 1350, which first came before this court in the Kelsey Case, *supra*, and in which it was held that the section did not apply to private bankers. Afterwards, by an act approved March 18, 1887, the section was amended so as to include "the owner, agent or manager of any private bank or banking institution" (Sess. Acts 1887. p. 162), and as thus amended, with slight verbal alterations, passed into the Revised Statutes of 1889 as section 3581, as hereinbefore set out. The offense of which the defendant was convicted was

Statute Making
Reception of
Deposits a Crime
—Special Legisla-
tion.

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committed on the 10th day of July, 1893. The bank of which he was president was a banking institution duly incorporated under the laws of this state; and there is, and can be, no question but that the offense was not only within the terms of the statute as it then existed, but as it had always previously existed from the beginning, as well as within the terms of the constitutional provision aforesaid, which authorized its enactment. That a law thus enacted, in obedience to an express mandate of the constitution, for the purpose of carrying into effect one of its provisions, is not a special law, and obnoxious to the provision of section 53, art. 4, of the state constitution, is well-settled law. State *v.* Walton, 69 Mo. 556; State *v.* Tolle, 71 Mo. 645; Ewing *v.* Hoblitzelle, 85 Mo. 64; State *v.* Hughes, 104 Mo. 459, 16 S. W. 489; State *v.* Yancy, 123 Mo. 391, 27 S. W. 380; State *v.* Higgins, 125 Mo. 364, 28 S. W. 638; Kenefick *v.* City of St. Louis, 127 Mo. 1, 29 S. W. 838; Spaulding *v.* Brady, 128 Mo. 653, 31 S. W. 103. And we may well pass to the consideration of the second proposition of this contention.

In the Sattley Case it was also urged that the section is repugnant to section 1, art. 14, of the amendments to the constitution of the United States; but as the learned counsel in that case had not suggested "how this section collides with the federal constitution," nor Same-Class Legislation. assigned "any reason, either verbally or in brief, in support of the objection," it was treated as frivolous. In this case no such answer can be returned to defendant's contention, which is specifically stated in the following language: "The invalidity of the statute arises from the fact that the presidents, directors, managers, cashiers, or other officers of trust companies organized and doing business under the provisions of article 11 of chapter 42 of the Revised Statutes are exempted from its operation." As to the institution of which the defendant was president, and the offense with which he is charged and of which he was convicted, this section is a literal transcript of section 27, art. 12, of the state constitution; and, if the statute is ob-

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noxious to the fourteenth amendment of the federal constitution, the provision of the state constitution aforesaid, which authorized its enactment, and to which it conforms, must also necessarily be in conflict with that amendment; so that the contention goes beyond the statute, and attacks the validity of section 27, art. 12, of the state constitution, to which our attention can be confined, since everything that can be said, impugning the validity of the statute, impugns as well this provision of the state constitution, the invalidity of which must be conceded, if inconsistent with the fourteenth amendment to the federal constitution (*Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567) which forbids any state to "deny to any person within its jurisdiction the equal protection of the law." "State legislation is not obnoxious to this provision, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect to both the privilege conferred and the liabilities imposed." 6 Am. & Eng. Enc. Law, p. 967, and cases cited in notes 7 and 8. As was said by MR. JUSTICE FIELD in *Railway Co. v. Mackey*, 127 U. S., *loc. cit.* 209, 8 Sup. Ct. 163, 32 L. Ed. 109: "The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. * * * Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws, because it is special in its character. * * * And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." And by this court, per BLACK, J., in *State v. Loomis*, 115 Mo., *loc. cit.* 313, 22 S. W. 351, 21 L. R. A. 803: "There is no doubt but many of our legislative enactments operate upon classes of individuals only, and they are not invalid, because they so operate, so long as the classification is reasonable and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers

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and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property, and the safety, health, and morals of the citizen." And by an eminent author: "The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or bankers, may require special statutory regulations for the general benefit; and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge. But a statute would not be constitutional which should prescribe a class for opinion sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." Cooley, Const. Lim. (6th Ed.) pp. 480-482. These extracts contain the substance of the doctrine on this subject deduced from all the authorities, many of which are cited in the brief of counsel for the defendant; and applying them to the provision of our state constitution in question, and the statute enacted in obedience to it, it would seem apparent, upon the very face of the provision, that it is not obnoxious to the inhibitions of the fourteenth amendment to the federal constitution. The language of the provision is comprehensive of a whole class. It exempts no one of that class. It applies to every president, director, manager, cashier, or other officer of every banking institution in the state. By it all persons of that class are treated alike, under similar circumstances and conditions. The classification is a natural and reasonable one;

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and the class, from the peculiar relation it sustains to the public, whose property the law is designed to protect, is a proper subject of such legislation. In fact, the defendant's contention seems to concede that this provision, and the act passed in obedience to it, had no inherent vice, but originally were, and continued to be, valid legislation, until the passage of the act designated in the Revised Statutes of 1889 as article 11 of chapter 42, and entitled "Trust Companies." This act was first passed and approved March 20, 1885; so that, according to this contention, the provision of the state constitution, and the act passed in obedience to it, in question, which up to that time were not obnoxious to the federal constitution, by virtue of this enactment at once came under the ban of the fourteenth amendment, and ceased to be valid law, in view of the fact that this court held in *State v. Reid*, 125 Mo. 43, 28 S. W. 172, that the officers of a trust company are not included within the provisions of section 3581. If these officers were not included within the terms of that section, they were not included within the terms of the constitutional provision, for the terms of each are the same, the one as broad as the other, and no broader, and hence the whole must fall. In support of this remarkable contention, we have been favored with a forcible argument by the learned and able counsel for the defendant, tending to show that these trust companies are banking institutions, and that their officers are conducting the same kind of business, under like circumstances, and in similar conditions, with the officers of the banking institutions of the state. The force of the argument is appreciated, and conceding, for the sake of the argument, that the proposition may have been demonstrated, yet the validity of the provision of the state constitution, and of the act passed in obedience thereto, is in no way affected by the conclusion, the only effect of which would be to bring these officers of trust companies within the same general terms of the constitutional provision and of the act, that include the defendant and the officers of every other banking institution in the state. While this argument, based upon the

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amendment to the federal constitution, may impugn the conclusions reached in the Kelsey and Reid Cases, when viewed in the light of that amendment, it does not touch the validity of the provision of the state constitution, or that of the act passed in obedience thereto and in the terms thereof. In neither of those cases was this federal question raised, and neither of them are authority in this case. No act of the legislature could have the effect of impairing the validity of a constitutional provision, and no decision of this court, in a case where the validity thereof was not questioned, can be invoked as authority for producing such an effect. Manifestly, this contention cannot be maintained.

2. The objections urged to the instructions upon which the case was submitted to the jury will be next considered. To No. 3 it is objected that the jury were not therein required to find that the offense charged was committed in Jackson county, nor was it required to find from the evidence that the defendant was an officer of the Kansas City Safe-Deposit & Savings Bank. Instructions to the jury are to be taken as a whole, and are ordinarily read in the order in which they are numbered. By instruction No. 2 the jury had just been required to find that the offense charged was committed in Jackson county, and that the defendant was the president of the bank. On the trial the fact that the bank was in Kansas City, in Jackson county; that the defendant was its president; and that the deposit was there made and received while he was such president, giving his personal attention to its affairs—was shown, not only by the uncontradicted evidence in the case, but by the evidence of the defendant himself. Under such circumstances, the fact that this instruction was not as explicit in the particulars mentioned as it might have been could not possibly have injured the defendant, and ought not to work a reversal of the judgment.

Harmless Error.

3. The objections to instruction No. 4 are answered by the case of *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72,

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in which it was, in effect, held that a bank is in failing circumstances when, from any cause, it is unable to pay its debts in the ordinary or usual course of business, and that, although this condition may have been produced by a "financial panic," that fact affords "no justification or excuse for the receipt by defendant, as its president, of moneys upon deposit, knowing that the bank was in failing circumstances."

Banks—Failing
Circumstances.

4. Instruction No. 5 is a literal transcript of the seventeenth instruction given in the Sattley Case, and was expressly approved in that case, the court saying: "This instruction is a rescript of the statute, and was expressly approved, after an exhaustive examination and discussion, in *State v. Buck*, 120 Mo. 479, 25 S. W. 573." The whole force of the criticism upon this instruction would have been dispelled if the court had given instruction No. 11, refused, which will be noticed later.

Same—Same—
Knowledge of
Officer—Pre-
sumptions.

5. The objection to instruction No. 6 is to the second paragraph, which is as follows: "The court instructs the jury that the indictment, of itself, is no evidence of guilt."

Counsel for defendant contend that in giving this paragraph, and in refusing to give instruction No. 1 for the defendant, the court committed error. It seems to be conceded that the substance of instruction No. 1 is included in this paragraph, and that the latter would not be objectionable but for the words "of itself," contained therein, the effect of which, it is contended, is to authorize the jury to take the fact of the indictment into consideration with the other facts and circumstances in the case, in determining the question of defendant's guilt or innocence, and thus give to that fact some weight in the determination. In the trial of every criminal case the jurors are necessarily advised that the defendant has been indicted for the offense charged, and it does not appear to us at all probable that any greater weight was given to that fact in the mind of the jury by reason of the phraseology of this paragraph, than

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would have been if the words "of itself" had been left out. While the hypothetical significance of these words, contended for, might appear, perhaps, to the acute perception of the skilled verbal critic, we are satisfied that such significance would not appear to or influence the practical mind of the ordinary juror. It is not at all to be feared that the defendant's case was prejudiced to any extent by reason of the action of the court on these instructions.

6. Counsel for defendant attach alike sinister significance to the same words "of itself" as used in instruction No. 9, and complain of that instruction for that reason, and for the further reason that the same is, and they contend, a comment upon the evidence. To the first complaint no further answer need be returned than is contained in the preceding paragraph. As to the second, it is only necessary to say that in showing the financial condition of the bank on the 10th day of July, 1893, the evidence disclosed the fact that the defendant was indebted to the bank in large sums for borrowed money. This evidence was perfectly legitimate for that purpose, and the evident intent of this instruction was to limit the effect of the evidence to that purpose, in order that the defendant's case might not be in any other wise prejudiced thereby, as the court might well do; the proper application of the evidence to the case being a question of law, and not a comment on the evidence in the case. The instruction is not very happily worded, but its meaning is clear and intelligible, and we cannot see that injury could have resulted to defendant from its phraseology.

7. Instruction No. 16 is the same as instruction numbered 7 in the Sattley Case, as to which this court in that case said: "Instruction numbered 7 has been approved so often in this state that we must decline to enter upon its defense. State *v.* Carlisle, 57 Mo. 102; State *v.* Brown, 104 Mo. 365, 16 S. W. 406; State *v.* Wisdom, 119 Mo. 539, 24 S. W. 1047." By this instruction the jury are required to take all the

Evidence—State-
ments of
Defendant.

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statements of the defendant, whether for or against himself, into consideration with all the other facts and circumstances proven. And, while the criticism to which the last paragraph is subjected by the learned counsel for the defendant in the present case may be well enough from the standpoint of the critical lawyer, yet when the instruction as a whole is looked at from the standpoint of the practical juror, for whose mind it is intended, and which has not been trained to the nice distinctions between disputable and indisputable presumptions, it loses all its force. This instruction has proven to be a good, workable instruction for many years, is not calculated to mislead a jury, and continues to command our approval.

8. The same may be said of instruction No. 18, in regard to evidence of good character, which is criticised in like manner, but which, in substance, has frequently been approved by this court. *State v. Jones*, 78 Mo. 278; *State v. Kilgore*, 70 Mo. 546; *State v. McMurphy*, 52 Mo. 251; *State v. Alexander*, 66 Mo. 148, *loc. cit.* 160. It is not subject to the criticism on the instruction in the last case.

9. We come now to the consideration of the instructions refused, which have been made the subject of exception, and not yet disposed of. In ruling on instruction No. 4 of these, the error assigned upon the admission of the evidence upon which it is based will also be disposed of. We do not think the court committed error in admitting this evidence and in refusing this instruction. The objection is, of course, that the opinions were formed upon hearsay, and is well answered by an eminent author as follows: "Value, it must be remembered, consists in the estimate, in the opinion of those influencing a market, attachable to certain intrinsic qualities belonging to the article to be valued. The opinion of such persons can only be presented, in most cases, by hearsay. A broker, for instance, is called as to the market value of a particular

Evidence—Previous Good Character.

Market Values—Hearsay Evidence

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piece of property, and, on his cross-examination as to the source of his knowledge, must ultimately say it came from A., B., and C. Even should they call A., B., and C., they would get no further than hearsay; for the testimony of either A., B., or C. as to what he would give for the article is of little weight, unless such testimony is based, not on any properties of the thing making it peculiarly valuable to this particular witness, but on the estimate at which the thing is generally held in the market. Hence it is that it is no objection to a witness testifying as to the market value that such evidence rests on hearsay. So it is admissible to fall back, as a basis of opinion, on prices current, provided they be traceable to reliable sources." Whart. Ev. § 449.

10. We do think, however, the court committed error in refusing instruction No. 10, telling the jury that they might disregard such opinion or estimates, if deemed by them to be unreasonable. *City of Kansas v. Butterfield*, Same—Same. 89 Mo. 646, 1 S. W. 831; *City of St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249; *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, and 35 S. W. 1137; *Hull v. City of St. Louis*, 138 Mo. 626, 40 S. W. 89; *Hoyberg v. Henske*, 54 S. W. —.

11. We also think the court committed error in refusing to give instruction No. 11. This instruction is a clear and concise presentation of the principle by which the jury should have been governed in arriving at their verdict under the statute governing the case, as expounded in *Instructions*. *State v. Buck*, 120 Mo. 492, 25 S. W. 573, in which the constitutionality of the statute was questioned on account of the new principle of evidence which it introduced, and which is not common to ordinary criminal cases. That the instruction was a proper one is not disputed by the attorney general, but it is contended that the substance of it may be spelled out from instructions Nos. 5, 12, 13, and 14, given. We do not think so. The giving of No. 5, on the contrary, emphasized the necessity of giving this instruction. *State v. Burlingame*,

Note

146 Mo. 207, 48 S. W. 72. It was not at all aided by instruction No. 12, and instructions Nos. 13 and 14 are the instructions usually given in ordinary criminal cases; and, while it may be possible that they would disclose to the legal mind the proper application of the principle contained in this instruction, it is much to be feared that they might not to the unskilled mind of the ordinary juror, and the liberty of the citizen ought not to be exposed to such a hazard. As the fate of the defendant in this case depended upon the proper application of a rule of evidence prescribed by statute, for this particular class of cases, the defendant was entitled to have it presented to the jury in clear and unmistakable terms, as was asked for in this instruction.

We find no error in the rulings of the court upon the admission or rejection of evidence, but, for the error in refusing to give instructions numbered 10 and 11, the judgment will be reversed, and the cause remanded. All concur, except SHERWOOD, J., absent.

NOTE.

Receiving Deposits after Insolvency—Constitutionality of Statute Prohibiting.—That statutes which forbid insolvent bankers from taking deposits on the pretense of solvency does not deprive them of any liberty or property right guaranteed by U. S. Const. 14th Amend. See *Dreyer v. Pease* (C. C. N. D. Ill.) 30 Chicago Leg. News, 401, 16 Nat. Corp. Rep. 1090, 88 Fed. Rep. 978; *Robertson v. People*, 20 Colo. 279; *Baker v. State*, 54 Wis. 368; *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176; see also *Com. v. Smith*, 11 Lanc. L. Rev. 350; *Winfield v. Ott*, 7 Okla. 512, 54 Pac. Rep. 714. See *contra Carr v. State*, 106 Ala. 35, 34 L. R. A. 634.

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WINFIELD NAT. BANK

v.

MCWILLIAMS.

(Supreme Court of Oklahoma, Feb. 7, 1900.)

Waiving Plea to Jurisdiction.—Where a defendant files a plea in the nature of a plea in abatement, which questions the jurisdiction of the court over the person of the defendant, and such defendant, without requesting or obtaining a ruling upon such plea, voluntarily obtains leave of court, and files his answer to the merits of the case, the filing of such answer waives the special plea to jurisdiction, and amounts to a general appearance in the case for all purposes.

Collections—Failure of Transmitting Bank—Right to Proceeds of Check.*—Where a bank, in the due course of business, receives from a correspondent bank a check indorsed in blank, and in good faith parts with value or permits an existing indebtedness to remain unpaid by reason thereof, it is entitled to the proceeds of such check against the real owner, even though the check was not actually collected by such bank until after failure of the bank which transmitted the same to it.

Same—Deposits—Title to Check Endorsed in Blank—Burden of Proof.—The holder of a check indorsed in blank, in law, is presumed to be the legal owner for value, and that it was indorsed to him before maturity; and the burden is upon one claiming to be the owner of such check to establish that he is the real owner, and that, although indorsed in blank, it was indorsed and deposited with a bank from which the holder received it, for "collection" only, and that no consideration passed to him for the same. Once these facts are established, then it is incumbent upon the holder of the check to establish that he received it in good faith, for value, or permitted an existing indebtedness to remain unpaid by reason of the check having been transferred to him.

Special Interrogatories.—Where a party to a civil action submits special interrogatories to be answered by the jury, it is the duty of the jury to answer each interrogatory by a direct answer; and they should not be permitted to evade such answers by referring to instructions of the court, or to certain parts of the evidence, but their answer should be a finding of fact.

(Syllabus by the Court.)

*See notes at end of case.

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ERROR by defendant from Kay county district court.
Reversed.

Pollock & Lafferty and *Samuel D. Pryor*, for plaintiff in error.

Charles J. Peckham and *Ed. L. Peckham*, for defendant in error.

BURWELL, J. On the 17th day of October, 1895, the defendant in error, Bettie McWilliams, was the owner and holder of a check on the Richmond National Bank of Richmond, Ky., for the sum of \$405, and on that date she took the check to the Farmers' & Merchants' Bank of Blackwell, Okl., and there deposited it for collection,—indorsed the check in blank: and thereupon the bank paid her the sum of \$50 on account of this check, and issued her the following receipt: "Blackwell, October 17, 1895. Received from Bettie McWilliams check on Richmond National Bank for \$405.00, for collection. Howard Peabody, Assistant Cashier." The Farmers' & Merchants' Bank then indorsed the check in blank, and forwarded it, with other checks and drafts, to the Winfield National Bank, at Winfield, Kan., "for collection and credit," which items amounted to \$669.46, and were credited to the account of the Farmers' & Merchants' Bank, subject to its check, on the 20th day of October, 1895. The check in controversy was forwarded by the Winfield National Bank direct to the bank upon which it was drawn, with instructions to remit to the correspondent of the Winfield National Bank in the city of New York, *viz.* the Hanover National Bank, which was done. On the 24th day of October, 1895, the Farmers' & Merchants' Bank, being insolvent, made an assignment for the benefit of its creditors, and thereupon ceased doing business. On the morning of the assignment the Farmers' & Merchants' Bank had to its credit with the Winfield National Bank, subject to check or sight draft, the sum of \$834.25. After charging the Farmers' & Merchants' Bank with an item of \$600, balance due on note, and with checks and drafts of the Farmers' &

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Merchants' Bank on the Winfield National Bank, the credit of the Farmers' & Merchants' Bank was reduced to \$13.92; and on the morning of the 25th the account of the Farmers' & Merchants' Bank with the Winfield National Bank was overdrawn, by their checks which came in, to the amount of \$10.08. On October 28th the defendant in error demanded of the Farmers' & Merchants' Bank the proceeds of the collection of the check left by her with that bank, which demand was refused; and thereafter, on April 27, 1896, the defendant commenced her action in the probate court of Kay county against the Farmers' & Merchants' Bank and the Winfield National Bank to recover the balance due her on the check which she had deposited with the Farmers' & Merchants' Bank for collection. The defendant in error then caused an attachment to be issued from the probate court, and levied upon certain promissory notes as belonging to the plaintiff in error, which were found in Kay county, and service was had upon the plaintiff in error by publication. The plaintiff in error, the Winfield National Bank, then entered a special appearance, and filed a plea to the jurisdiction of the probate court, which was overruled, to which ruling of the court the plaintiff in error excepted. The probate court of Kay county then entered judgment in favor of the plaintiff and against the defendants, the Winfield National Bank and the Farmers' & Merchants' Bank, from which judgment the Winfield National Bank appealed to the district court of Kay county. After perfecting its appeal to the district court, the Winfield National Bank then filed its answer, and moved to discharge the attachment which had theretofore been levied upon certain notes as the property of the Winfield National Bank. This motion was overruled by the court, to which the defendant excepted. A trial was then had to a jury, which resulted in a judgment in favor of the plaintiff, Bettie McWilliams, and against the Winfield National Bank and the Farmers' & Merchants' Bank of Blackwell. A motion for new trial was duly filed, and overruled by the court; and now the Winfield National

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Bank brings the case here, upon a petition in error and case made, and prays a reversal of the judgment of the district court.

The real question involved in this case is, shall the Winfield National Bank, or Bettie McWilliams, bear the loss of the balance due defendant in error on the check? But, before passing on that point, we will consider the effect of the appearance entered by the plaintiff in error in the probate and district court. It is contended

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by the plaintiff in error that the probate court of Kay county had no jurisdiction of the person of the plaintiff in error, because it was a nonresident of the territory, and no summons was served upon it. It is clear that no personal judgment could legally be rendered against the Winfield National Bank by the probate court of Kay county unless its appearance in that court amounted to a general appearance. As shown by the foregoing statement of facts, certain notes were seized by attachment as the property of the Winfield National Bank. The only pleading filed or only appearance entered by the Winfield National Bank in the probate court was the filing of what plaintiff in error designated as a "plea to the jurisdiction of the court." This was a pleading in which it was alleged that the notes attached in the action had been the subject of a certain action in the district court of Cowley county, Kan., and that the defendant Winfield National Bank had been directed by the court to deliver these notes into court, after a sufficient amount was collected by the bank to satisfy a lien it held on them to pay a judgment rendered against the owner of the notes. This pleading was evidently intended as a plea in abatement, and the prayer was for the dismissal of the action. As to whether the filing of this pleading amounted to a general appearance, is a question on which the authorities are not uniform; but, so far as this case is concerned, it is immaterial, for the reason that the Winfield National Bank, after judgment was rendered against it in the probate court, appealed to the district

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court, and, after obtaining leave of court, filed an answer which contained a general denial, followed by several special defenses. But the plaintiff in error insists that it did not waive any rights it had under its special plea by pleading to the merits. With this contention we cannot agree. If the plaintiff in error relied upon the special plea to the jurisdiction of the probate court, it should have presented it to the district court, and given it an opportunity to pass upon that question. This, so far as the record shows, was not done; and when the plaintiff, without presenting and obtaining a ruling on its special plea, voluntarily obtained leave of court, and filed its answer, and entered upon the trial of the merits of the case, it waived all rights, if any it had, under its special plea.

It is next contended by plaintiff in error that instruction No. 4 given by the court is erroneous. The instruction is as follows: "You are instructed that when a bank, in the usual course of business, receives for collection a check drawn upon a bank located at a place other than the place of business of the receiving bank, such receiving bank thereby becomes the agent for collection of the persons from whom such check is received, and acquires no general ownership of such check, or the proceeds of the collection thereof." This instruction was equivalent to advising the jury that when the Farmers' and Merchants' Bank of Blackwell, in the usual course of business, received for collection the check drawn upon the Richmond National Bank of Richmond, Ky., and forwarded it to the Winfield National Bank of Winfield, Kan., the Winfield National Bank thereby became the agent, for collection, of Bettie McWilliams, and that it acquired no general ownership of such check, or the proceeds of the collection thereof. This instruction, under the facts in this case, was not a correct statement of the law, as will be shown by the great weight of authority. In 3 Am. & Eng. Enc. Law (2d Ed.) p. 818, it is said: "The rule generally adopted is that where the collecting bank has

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no notice that the remitting bank is not the owner of the paper remitted, and, on the credit of such remittances made or anticipated in the usual course of business between them, balances are from time to time suffered to remain in favor of the remitting bank, to be met by the proceeds of such paper, then the collecting bank is entitled, even as against the real owner to retain the proceeds of such paper for a balance of account due it by the remitting bank." In the case of *Ayres v. Bank*, 79 Mo. 421, it is said: "The plaintiff deposited with the Mastin Bank a check drawn by a third person, for collection and credit to his account. In accordance with the arrangement between the parties, the Mastin Bank gave the plaintiff immediate credit for the check, and the plaintiff immediately drew against it. The Mastin Bank sent the check to defendant, its corresponding bank, who charged it to the drawer, and credited the Mastin Bank. The latter meantime had failed and made an assignment, but the defendant did not know it. Held, that the plaintiff could not recover on the check from the defendant." The case of *Vickery v. Association* (C. C.) 21 Fed. 773, is also in point. MR. JUSTICE BREWER in this case used the following language: "Where a negotiable instrument, indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank, 'for collection and credit,' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks." In that case it is further said: "So far as any hardship on the plaintiff is concerned, he has no one but himself to blame. He chose to give an unrestricted indorsement, and thus permitted it to pass into the channels of trade as apparently the property of the Indiana bank. He trusted that bank, and must abide the consequences of his confidence. That the indorsement to the defendant was for collection is

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immaterial. The question in this case is not whether title is apparently transferred to the collecting bank, but whether it has a right to treat the transmitting bank as the owner. It had such right in this case, and therefore judgment will be entered in favor of defendant." And again, in *Bank v. Beale* (C. C.) 49 Fed. 606: "Plaintiff and defendant banks for several years had acted as agents for each other in the collection of checks, notes, and drafts; the practice being for each to credit the other for checks when received, and for drafts and notes when advised of their payment. When a check was returned unpaid after being credited, the amount thereof was charged back again. The amounts thus collected were mingled with the general funds of the bank. Plaintiff sent defendant a note for 'collection and credit,' which, on maturity, was paid by a check, and credit was immediately given on the books. But defendant failed, and the check passed into the hands of the receiver. Held that, in view of the course of dealing, the two banks stood in the relation of debtor and creditor with respect to the amount of the check, and it became a part of the assets of the bank." To the same effect is *Association v. Clayton*, 6 C. C. A. 108, 56 Fed. 759. The supreme court of the United States has passed upon this same question a number of times. In the case of *Bank of the Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115, it is said: "If negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, without notice that it does not belong to the former, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, if that balance has been allowed to arise and remain on the faith of receiving payment from such collections, pursuant to a usage between the two banks." This case came before the supreme court of the United States a second time, and was reaffirmed, in 6 How. 212, 12 L. Ed. 409. To the same effect is the case of *Wyman v. Bank*, 5 Colo. 30, and *Carroll v.*

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Bank, 30 W. Va. 518, 4 S. E. 440. Many other authorities could be cited which are in harmony with the rule as enunciated by the above authorities, but the rule is so well settled that we deem further reference to precedents unnecessary. It is true that there are a few courts which hold that each bank through which a check, note, or draft is deposited for collection, even though it be indorsed in blank, acts as the agent of the real owner of the check, and in no event acquires a lien on it for a balance due from the bank from which it was received, unless the collecting bank part with a present consideration in good faith; but the weight and better authority are the other way.

In this case, as shown by the record, the Farmers' & Merchants' Bank remitted its collections to the Winfield National Bank, and then it would make checks and drafts on the Winfield Bank for balances, from time to time. The check in controversy was transmitted by the Farmers' & Merchants' Bank to the Winfield National Bank for "collection and credit." There was nothing on the check to indicate that the Farmers' & Merchants' Bank was not the real owner. The defendant in error indorsed the check in blank, and delivered it to the Farmers' & Merchants' Bank, who sent it to the plaintiff in error, with the express direction to "collect and credit." The defendant in error could have written over her name, "For collection," which would have advised every one through whose hands it passed that the check was her property. This she negligently failed to do, and it is only just that she bear the loss occasioned by her own carelessness. The Winfield National Bank had no knowledge that the defendant claimed any interest in the check until after the Farmers' & Merchants' Bank had failed, and the proceeds of the check had been applied. On the strength of this check and other collections, the plaintiff in error paid out funds from day to day on checks and drafts of the Farmers' & Merchants' Bank. It had on deposit to its credit with the Winfield National Bank on October 19, 1895, \$1,342.58, and the check in controversy entered into

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that balance. Prior to the morning of October 24th this balance had been reduced to \$834.25, and at the close of the day's business it only amounted to \$13.92; and on the morning of the 25th this small balance was wiped out, and a balance of \$10.08 in favor of the Winfield National Bank was caused by the receipt of checks on that morning. All of these transactions took place without any knowledge on the part of plaintiff in error that Bettie McWilliams claimed any interest in the check. We think that it is clear that the plaintiff paid out money and permitted balances due it from the Farmers' & Merchant' Bank to stand partly on the strength of the check in controversy, and therefore should be protected.

But it is insisted that the check was not collected by the Winfield National Bank until the 25th of October, 1895, which was after the Farmers' & Merchants' Bank had made an assignment, and that, inasmuch as the check was not collected at that time, it was the property of the defendant in error, and she was entitled to the particular proceeds of the same. There are authorities which apparently sustain this contention, and these we will here briefly notice. The case of *Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. 1031, from a casual reading, would seem to support this view, but, when carefully considered, must be placed on the side of the authorities heretofore referred to in this opinion. In that case *Wilkinson & Co.* was a private banking firm at Syracuse, N. Y. The plaintiff was a banking corporation in the city of New York. The plaintiff sent to *Wilkinson & Co.* checks and drafts indorsed as follows: "Pay *Wilkinson & Co.*, or order, for collection for account of *National Butchers' and Drovers' Bank of the City of New York*. W. H. Chase, Cashier." *Wilkinson & Co.* failed and made an assignment before all of the checks and drafts were collected, making *Charles E. Hubbell* assignee; and the court there held that all of the checks which were not collected by *Wilkinson & Co.* before the assignment continued to be the property of the plaintiff. But this decision was based upon the ground that the

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checks were indorsed, "For collection;" and the learned justice who wrote this opinion distinguishes it from the case of *Clark v. Bank*, 2 N. Y. 380, and says that in the case just referred to the indorsement was in blank, and then quotes as follows from the body of the opinion: "The whole arrangement was one of mutual convenience, and to hold that such drafts were transmitted for collection merely, with no right to a credit or to draw against them until they were actually paid, is to lose sight of the situation of these brokers, their business, and their necessities." In *Sweeny v. Easter*, 1 Wall. 166, 17 L. Ed. 681, the indorsement was as follows: "Pay Sweeny R. F. & Co., for collection. Sam Harris & Sons." *Blaine v. Bourne*, 11 R. I. 119, is to the same effect, except that the court further held that an indorsement, "Pay Jay Cook & Co., or order, on account of Blaine, Gould & Short, Northeast, Pa. Alfred A. Short, Cashier,"—was a special, and not a general, indorsement, and that it was sufficient to give notice that Blaine, Gould & Short retained the property in the bill. *Millikin v. Shapleigh*, 36 Mo. 596, merely follows the well-established rule that an indorsement, "For collection," gives notice that the indorser is the owner of the bill. In *Bank v. Davis*, 114 N. C. 343, 19 S. E. 280, BURWELL, J., speaking for the court, says: "The relation between a bank transmitting paper for collection, and the bank receiving and collecting such paper and mingling its proceeds with its other funds, is that of debtor and creditor, merely; and the creditor bank has no lien upon or for moneys collected, and no preference over the other creditors of the receiving bank." In the case of *City of Somerville v. Beal* (C. C.) 49 Fed. 790, the city treasurer deposited certain checks with the Maverick National Bank at a quarter of 3 on Saturday, and credit was immediately given the depositor in his little bank book. The bank closed at 3, and was declared insolvent. On this state of facts the court held that the title to the checks passed to the bank, and that the deposit of the checks and the giving of credit therefor in the bank books created the relation of

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debtor and creditor, but decided in favor of the city, on the ground of fraud. However, when the case reached the circuit court of appeals (1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291) that court held that no title passed to the bank, except as bailee. This case was very ably considered by JUDGE PUTNAM, who wrote the opinion; but the rights of a third party had not intervened, and it was a question between the two original parties, and the rights of an innocent indorsee were not considered. Therefore the facts in that case were not the same as in the case at bar. The case of *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, has an important bearing on the case under consideration. The Commercial National Bank of Pennsylvania contracted with the Fidelity National Bank of Cincinnati, Ohio, to collect for it at par from all points west of Pennsylvania; and the checks and drafts were stamped, "Pay to the Fidelity National Bank, or order, for collection for the commercial National Bank of Pennsylvania." The Fidelity National Bank was to remit balances at stated periods. Large amounts were sent to the Fidelity National Bank for collection, and it, in turn, forwarded them to other banks for collection. Finally the Fidelity National failed. Some of these checks had been collected, some were in the hands of other banks, and some had been collected by other banks, and the Fidelity National Bank given credit by such banks on debts due from the Fidelity National Bank to them. In this case it was held that, so far as the uncollected checks and drafts were concerned, the Fidelity National, and the other banks to which they had been forwarded for collection, were the agents of the Commercial National of Pennsylvania, and that the plaintiff was entitled to recover the specific drafts, or the proceeds thereof; but in speaking of the checks and drafts that had been collected by the banks to which they had been forwarded by the Fidelity National, and the proceeds thereof applied to indebtedness due from the Fidelity National to them, BREWER, J., speaking for the court, said: "We also agree with the circuit court in its conclu-

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sions as to these moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them before its insolvency was disclosed; for there the moneys had practically passed into the hands of the Fidelity; the collection had been fully completed. It was not a mere matter of bookkeeping between the Fidelity and its agents. It was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but a settlement between the Fidelity and the principal, the plaintiff." It will be seen from this case that even though a check is indorsed, "For collection and credit," and forwarded to a receiving bank, which then forwards it to another bank, which collects the check, and applies the proceeds upon an indebtedness due from the bank to which it was first sent to the bank collecting the check, an action will not lie by the bank owning the check against the bank which collects and applies the proceeds thereof on a debt due it from the bank which forwarded the check to such collecting bank.

The question presented in this is not as to whether the plaintiff was the real owner of the check, but what are her rights as against the Winfield National Bank, who received the check from the Farmers' & Merchants' Bank, with only a general indorsement thereon? It is admitted by the parties to this action that, when this check was received by the Winfield National Bank, it immediately gave the Farmers' & Merchants' Bank credit therefor, and that the Farmers' & Merchants' Bank had a right to check against this credit, which it subsequently, and before its failure, did. We have carefully examined many authorities bearing upon the questions presented in this case, but we have failed to find any authority which holds that, under the facts presented by the record in this case, the defendant in error is entitled to recover. The supreme court of Maryland, in case of *Ditch v. Bank*, 79 Md. 192, 29 Atl. 72, 138, says: "If one deposits a check, payable to his order indorsed, 'For deposit to

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the credit of' the payee, and which is credited to him by the bank as cash, and the bank indorses it, 'For deposit' to its own credit, and transfers it to another bank, which credits it *bona fide* as cash, and pays the former bank, which afterwards assigns for the benefit of creditors, the title to the check is vested in the latter bank." The following authorities support the above rule, or contain statements throwing some light upon the question: *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 729; *Bank v. Loyd*, 90 N. Y. 530; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *Oddie v. Bank*, 45 N. Y. 735; *Bank v. Burns* (Ala.) 44 Am. Rep. 138; *Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Railway Co. v. Johnston* (C. C.) 27 Fed. 243; *Bank v. Gregg*, 138 Ill. 596, 28 N. E. 839; *In re State Bank*, 56 Minn. 119, 57 N. W. 336; *Hoffman v. Bank*, 46 N. J. Law, 604. And this rule is not limited to cases where checks are drawn upon the same bank which credits them as cash. Notwithstanding the foregoing authorities, we do not wish to be understood as laying down the rule that the mere crediting the Farmers' & Merchants' Bank with the amount of the check in controversy necessarily passed the title to the Winfield National Bank, as against the defendant in error. We are of the opinion that, even though the Farmers' & Merchants' Bank was credited on the books of the Winfield National with the amount of the check, the defendant in error is entitled to recover the check, or the proceeds thereof,—the same having been collected after the failure of the Farmers' & Merchants' Bank,—unless the Winfield National parted with a present consideration without any knowledge as to who was the true owner of the check, or suffered balances due it from the Farmers' & Merchants' Bank to remain unpaid, and the check either wholly or partially influenced the extension of payment. *Wilson v. Smith*, 3 How. 763, 11 L. Ed. 820. But, if either was done by the defendant, then the fact that the check was not collected until after the failure of the Farmers' & Merchants' Bank is immaterial, because under such state of facts it is an innocent

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holder for value. This view is supported by 2 Morse, Banks, p. 931, § 591. "The general rule of law is that, if a person employs an agent to collect money under such circumstances that the agent naturally employs a subagent to accomplish the actual collection, then the principal will be entitled to sue the subagent, and collect the money directly from him, without regard to the relationship or condition of accounts existing between such agent and subagent, and although the subagent had no knowledge that his employer was an agent and not a principal. But if the owner has delivered the paper to the agent, with no indicia whatsoever to show that such agent is not the owner, and the subagent receives it from the agent, supposing him to be the owner, and gives him credit upon the strength thereof, then the principal cannot recover from the subagent." And again, on page 933: "Where a negotiable instrument, indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank, for 'collection and credit,' before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks." As to whether or not the title to a check or draft on which there is an unrestricted indorsement has passed to the bank, under a disputed state of facts, is a question for the jury, under proper instructions from the court; and the test is, has the bank, in good faith, parted with value, or, on account of the check or draft, extended payment of an existing indebtedness? Of course, when the facts are admitted, the question then is purely one of law. But in all such cases it should be the object of courts and juries to ascertain the true intent of the parties.

The error in instruction No. 4 was not cured by any other instruction. The court apparently failed to distinguish between a check indorsed in blank and one indorsed, "For

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collection." By section 3212, St. Okl. 1893, it is provided, "A banker has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal." But this section only gives a banker a lien on the property belonging to the customer of the bank, which is in the bank's possession. If the property is not in fact the property of the customer, then the bank has no lien, unless it received it for value, or by reason thereof extended payment on an existing debt.

The court also instructed the jury: "You are instructed that in an action against a party to whom such check, or the proceeds thereof, may come in the usual course of business, and who claims to have taken the same in good faith and for value, and without notice of the ownership of such check, or of the insolvent condition of the bank from which it is received, the burden is upon such party to establish the truth of such claims by a preponderance of the evidence." This instruction cast the burden upon the Winfield National Bank to establish that it received the check in good faith, for value, in the first instance. We cannot agree with this rule: The holder of a check indorsed in blank, in law, is presumed to be the legal holder for value, and that it was indorsed to him before maturity; and in this case the burden was upon the plaintiff below to establish that she was the real owner of the check, and that, although indorsed in blank, it was only, in fact, deposited with the Farmers' & Merchants' Bank for collection. Once these facts are established, then the bank should show by a preponderance of the evidence that it received the check in good faith, for value, or had permitted an existing indebtedness to remain unpaid. *Ecton v. Harlan*, 20 Kan. 452; *Rahm v. Manufacturing Co.*, 16 Kan. 530; *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347; *Mann v. Bank*, 34 Kan. 746, 10 Pac. 150.

One other point is urged by plaintiff in error which is worthy of consideration, and that is that the jury failed to

Same—Deposits—
Title to Check
Indorsed in
Blank—Bur-
den of Proof.

Notes

properly answer interrogatories submitted to them. This point is also well taken. The jury in every answer seems to have tried to frame their answers so that they would be favorable to the defendant in error, regardless of whether the evidence warranted it or not. The jury may have acted in good faith and with the best of motives, but some of the answers are not justified, and others evade the question asked. The plaintiff was entitled to have every proper question asked answered by a direct answer, if the jury could agree; and, if they could not agree, no answer should be given. For the reasons stated herein, we are of the opinion that the judgment of the district court should be reversed and set aside, a new trial granted, and the case remanded to the lower court, at the cost of the defendant in error, with direction to proceed in conformity with the views expressed in this opinion. It is so ordered by the court. All of the justices concurring, except HAINER, J., who presided in the court below, not sitting.

Special Interrogatories.

NOTES.

Collections—Failure of Transmitting Bank—Right to Proceeds of Check.—The rule stated in the leading case is that supported by the weight of authority. *Triberg v. Cox*, 97 Tenn. 550, 37 S. W. 283; *Carroll v. Exchange Bank*, 30 W. Va. 518, 8 Am. Rep. 101; *Bury v. Woods*, 17 Mo. App. 246; *Millikin v. Shapleigh*, 36 Mo. 600, 88 Am. Dec. 171; *Miller v. Farmers' Bank*, 30 Md. 392; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Wyman v. State Nat. Bank*, 5 Colo. 30, 40 Am. Rep. 133; *Vickrey v. Sav. Assoc.*, 21 Fed. Rep. 773; *Chicago Nat. Bank v. Reno County Bank*, 1 McCrary (U. S.) 491; *Sweeny v. Easter*, 1 Wall. (U. S.) 166; *Bank of Metropolis v. New England Bank*, 1 How. (U. S.) 234, 6 How. (U. S.) 212. See also *Clarion First Nat. Bank v. Gregg*, 79 Pa. St. 384.

Same—Same—Contrary Rule.—See *Lawrence v. Stonington Bank*, 6 Conn. 521; *Quebec Bank v. Weyand*, 2 Cin. Sup. Ct. Rep. 538; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dod v. New York Fourth Nat. Bank*, 59 Barb. (N. Y.) 265; *Lindauer v. New York Fourth Nat. Bank*, 55 Barb. (N. Y.) 75; *Van Amee v. Troy Bank*, 8 Barb. (N. Y.) 312; *Corn Exch. Bank v. Farmers' Nat. Bank*, 118 N. Y. 443; *Meridian First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579; *Boykin v. Bank of Fayetteville*, 118 N. Car. 566, 24 S. E. 357.

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PACIFIC NAT. BANK OF TACOMA

v.

PIERCE COUNTY *et al.*

(*Supreme Court of Washington, March 23, 1899.*)

National Bank Stock—Taxation by State—Stock of Other Corporations—Owned by Bank—Double Taxation.—Under the laws of Washington, in assessing for taxation the aggregate value of the stock of a national bank it is proper to include in such valuation the stock of other corporations acquired by the bank in the ordinary course of its business, to prevent loss, although the property of such corporations is located, assessed, and taxed within the state, double taxation not being forbidden by the state constitution.

Same—Same—Uniformity.—A constitutional provision requiring "a uniform and equal rate of assessment and taxation" does not necessarily require uniform methods of assessment.

Same—Same—Equality—Federal Statute.—The statute of Washington under which the value of the stock of other corporations acquired by a national bank in the ordinary course of its business, to prevent loss, is properly included in the assessment of the aggregate value of its stock for taxation is not in conflict with the section of the federal statute providing that a state shall not tax national bank stock at a greater rate than other moneyed capital in the hands of individual citizens of the state; as under such statute there is no unjust discrimination between the taxation of national bank shares as the personal property of the shareholder and the taxation of the personal property of a citizen not a holder of national bank stock.

APPEAL by plaintiff from Pierce county superior court.
Affirmed.

E. M. Hayden, for appellant.

A. R. Titlow, for respondents.

REAVIS, J. Appellant is a national bank, doing business in the city of Tacoma, and brought this action to enjoin the collection of the remainder claimed to be due for taxes assessed against the stock of the bank for the year 1897. The complaint states that the bank owned stocks of other corporations in the aggregate sum of

Case Stated.

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\$86,350, which stocks were acquired in the ordinary course of the bank's business, to prevent loss, and were of the par value of \$86,350; that the other corporations in which such stock was held were located in the state of Washington; that the property of such corporations was assessed and taxed to such corporations in the year 1897; that appellant demanded a deduction of the fair cash value of such stocks held by it in other corporations from the aggregate value of the bank's shares assessed to its stockholders from the assessor and the county board of equalization, and that such deduction was refused; and that appellant also paid the amount of the tax justly due upon the assessment of its shares of capital stock, but refused to pay the balance claimed by the respondents. Demurrers were interposed to the complaint on six grounds, only one of which, in the view taken of the case, will be considered here; that is, that the complaint does not state facts sufficient to constitute a cause of action. The demurrers to the complaint were sustained by the superior court, and judgment rendered in favor of the respondents.

Appellant assigns as error the order sustaining the demurrers to the complaint and entering judgment in favor of the respondents. Counsel for appellant maintains that respondents seek to tax its stockholders upon a valuation inclusive of all the property of the bank except only real estate; that the property owned by the bank, and included in the valuation of its shares to the stockholders, includes the \$86,350 made up of the stocks of other corporations, the property of which is located within this state, and assessed and taxed here; that these facts were called to the attention of the assessor, and proper complaint made to the board of equalization; that they arbitrarily and fraudulently refused to value the shares exclusive of the shares of such stocks in other corporations; and that similar stocks held by individual citizens and corporations, other than banks within the state, are not taxed.

It is contended, first, that the assessment of the bank in the method set forth is double taxation, and that, even in the

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absence of constitutional prohibition, such tax, being unjust and inequitable, will not be imputed, where it can be held under the law that double taxation is not intended. It is also contended that the assessment of the shares of the bank is in conflict with sections 1, 2, and 3 of article 7 of the state constitution, and in conflict with section 5219 of the Revised Statutes of the United States.

1. JUDGE COOLEY, in his work on *Taxation* (2d Ed.), at page 219, observes: "It has been remarked on a preceding page that, when personal property is taxed, duplicate taxation is sometimes imposed. By this was meant that such property sometimes, after being sub-

National Bank
Stock—Taxation
by State—Stock of
Other Corpora-
tions—Owned by
Bank—Double
Taxation.

jected to one levy for the support of government for the current year, is, by a change of circumstances, subjected to taxation a second time for the support of the government during the same period.

* * * A system of indirect taxes, combined with a system of general taxation by value, must often have the effect to duplicate the burden upon some species of property or upon some persons, and the taxation of stockholders in a corporation, and also of the corporation itself, must sometimes produce a like result. There is also sometimes what seems to be a double taxation of the same property to two individuals; as where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt. * * * Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and, if inequality in result must defeat the general law, then taxation becomes impossible." In *West Chester*

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Gas Co. v. Chester Co., 30 Pa. St. 232, it was said: "The power of the legislature to tax twice is as ample as to tax once;" and this is approved in *Pittsburg, Ft. W. & C. Ry. Co. v. Com.*, 66 Pa. St. 73. See, also, *Davidson v. New Orleans*, 96 U. S. 97. In fact, it may be said that the authorities almost uniformly state the principle that, unless forbidden by constitutional provisions, double taxation does not render a tax void; and while true, as said by counsel for appellant, that the intent to levy a double tax must plainly appear, and will not be assumed, yet, if such should be the result of a method of taxation of personal property, it does not invalidate the tax.

The revenue law of 1897 (section 1671, 1 Ballinger's Ann. Codes & St.) provides, with reference to individuals listing property for taxation: "No person shall be required to list for taxation in his statement to the assessor any share or portion of the capital stock, or of any of the property of any company, association or corporation, which such person may hold in whole or in part, where such company, being required so to do, has listed for assessment and taxation its capital stock and property with the auditor of state, or as otherwise required under the laws of this state." Section 1676, *Id.*, provides how the property of corporations within the state shall be assessed. It directs the president, secretary, or principal accounting officer or agent of the corporation to list the property, real and personal, and that it shall be assessed and taxed the same as other real and personal property. It will thus be seen that capital stock and property of corporations situated within the state, other than state and national banks, are assessed upon their property in the same manner as is property assessed to individuals in the state. National and state banks are assessed and taxed under section 1677, *Id.*, and provisions for the collection made under sections 1678-1680, *Id.* Section 1677 reads as follows: "All the shares of stock in banks, whether of issue or not, existing by authority of the United States or the state, and located within the state, shall be assessed to the owners thereof; * * *

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all such shares shall be assessed at their full and fair value in money, * * * first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate, and no greater, than that at which other moneyed capital in the hands of citizens and subject to taxation, is by law assessed."

It would seem that this tax is intended to be, and is, an excise on the franchise of banking corporations, and not on their property. It is said by the supreme court of Massachusetts, in the case of *Com. v. Hamilton Mfg. Co.*, 12 Allen, 298: "The market value of the shares of a corporation, or the aggregate market value of all the shares,—by which we understand the cash price for which the shares will sell in the market,—does not necessarily indicate the actual value or amount of property which a corporation may own. The price for which all the shares would sell may greatly exceed the aggregate of the corporate property, or it may fall very far short of it. Undoubtedly, the amount of property belonging to a corporation is one of the considerations which enter into the market value of its shares; but such market value also embraces other essential elements. It is not made up solely by the valuation or estimate which may be put on the corporate property, but it also includes the profits and gains which have attended its operations, the prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. In other words, it is the estimate put on the potentiality of a corporation, on its capacity to avail itself profitably of its franchise, and on the mode in which it uses its privileges as a corporate body, which materially influences, and often controls, its market value. Familiar examples will illustrate this. Thus, the shares in a corporation may have a market value and sell for a high price before any of its capital stock has been paid in or it has acquired any corporate property. In such a case, it is the estimate put on its franchise, and the expectation of the benefits and advantages to be derived from it, which give it a value. So, there

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may be two corporations organized with similar powers, having the same number of shares, the same amount of property or capital, and both may be engaged in the same branch of business. The market value of the shares in one corporation may be double that of the other, because one is prosperous, and likely to make large gains, while the other is unsuccessful, and is carrying on a business which may prove unprofitable or lead to heavy losses." In the case of *Com. v. New England S. & T. Co.*, 13 Allen, 391, a tax was levied upon a corporation in Boston. The par value of its stock was \$50 per share. The cash market value was assessed at \$30. The corporation had real estate situated in the state of New York. It also owned 8,550 shares of another corporation, the property of which was listed and taxed within the state of Massachusetts. No deduction was made by the assessor on account of the shares of the stock owned in the corporation, and on which the tax had been paid, and the tax was laid on the full market value of the shares. The court sustained the tax, and observed: "The tax imposed by St. 1864, c. 208, has been decided to be an excise upon the corporate franchise, and not a property tax. *Com. v. Hamilton Mfg. Co.*, 12 Allen, 298. It is not affected by the character of the investments of the corporate property, except so far as deductions are allowed by the provisions of the statute itself, and the statute does not authorize the deductions which are claimed in this case. The constitutionality of the tax is not to be determined by circumstances which are peculiar to the particular case in which the question arises. The provisions of St. 1864, c. 208, have been decided to be in accordance with the constitution; and the fact that the defendant corporation held property, which was subject to the burden of taxation in other ways, does not render this tax upon its franchise illegal. In the practical operation of the powers of taxation, which are given in several forms, it is inevitable that double taxation should occur in some cases. The legislature may relieve against it by allowing deductions, if

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it sees fit to do so, but the court can only apply the law as it stands." The supreme court of the United States in *Van Allen v. Assessors*, 3 Wall. 583, observes, with reference to such tax: "But, in addition to this view, the tax on the shares is not a tax on the capital stock of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.

The constitutional mandate (section 2, art. 7) of the state requires "a uniform and equal rate of assessment and taxation" on all property in the state according to its value in money, and "the legislature shall Same—Same—Uniformity. prescribe such regulations by general law as shall secure a just valuation." This requirement is not of uniform methods of assessment. The legislature must prescribe the regulations for ascertainment of the value of property, and it may provide different regulations for the assessment of different classes of property, and, if not restricted by constitutional provisions, the legislature may impose taxes on one class of property, and completely exempt another class of property from taxation. In the cases of *Newport v. Mudgett*, 18 Wash. 271, 51 Pac. 466, and *Bank v. Manring*, 18 Wash. 250, 51 Pac. 464, debts were authorized to be deducted from a share of bank stock because a deduction of such debts was authorized from all other credits owned by individuals in the state, by general law, and shares of bank stock, are assessed and taxed as personal property of the individual holder of such stock, and the tax levied upon his stock was there held to be a tax upon a credit; and thus his bank stock, viewed as a credit, was entitled to be assessed, under the same privilege of deduction of his debts, as in the same class with all other credits assessed in the state. When the share of bank stock was assessed as a credit, then it fell within the class of credits, and the rule of uniformity required that the same

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deduction of debts be allowed upon it as upon all other credits; and, further, to satisfy the rule of uniformity, if a portion of any class of property is exempt from taxation, the whole class of such property must be exempt. The shareholder in a state or national bank is assessed upon his stock as he is upon any other personal property which he may own. He is assessed upon such share at its fair market value, and by the same method as is all other personal property in the state. The rate of assessment and taxation is the same as upon all other personal property. The method of valuation is the same. It is true, a different regulation is made in the revenue law for the assessment of the property of some corporations owning tangible property in the state, as has been before observed, where the property, both real and personal, and the franchise, are assessed together to the corporation itself, and we do not think there can be said to be any inequality here.

2. Section 5219 of the Revised Statutes of the United States authorizes the taxation of shares of national banking associations located within the state, subject only to the restriction, as to manner of the assessment, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." In the case of *Van Allen v. Assessors*, *supra*, it was said: "The main and important question involved, and the one which has been argued at great length and with eminent ability, is whether the state possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders whose capital is wholly vested in stock and bonds of the United States;" and the court concludes that this power is possessed by the state. In the case of *People v. Commissioners*, 4 Wall. 244, the question of the validity of a statute of the state of New York, which authorized the taxing of bank shares where the capital of such bank was invested in United States securities exempt from taxation under the acts of congress, and also whether a taxation of the shares of the

Same—Same—
Equality—Federal Statute.

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stockholders was valid because of an alleged discrimination made in favor of other state corporations and individual citizens of the state, arose. The shares of stock in national banks were assessed to the stockholders, and with the same valuation as other personal estate. No deduction was made on account of investments by the bank in United States bonds, which were exempt from taxation. But, under the law of the state, a deduction or allowance was made upon assessments on all insurance companies and on all individuals for United States bonds owned by them. It was maintained on the part of the stockholder that there was an illegal discrimination made in favor of other state corporations and of individual citizens of the state, because such exempt securities were deducted from the assessment of individuals and insurance corporations in the state. But the assessment was held valid, the court observing: "It is argued that the assessment upon the shares of the relator is at a greater rate than that of the personal property of individual citizens, upon the ground that allowance was made upon account of United States securities held and owned by them, when at the same time the deduction was disallowed to him. The answer is that, upon a true construction of this clause of the act, the meaning and intent of the lawmakers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens. * * * Another objection taken is that the taxation of the shares of the relator is illegal, on account of this deduction; it being a departure from the rate of assessment prescribed in the clause already stated. The answer is that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the

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words or contemplation of congress; but, even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them. These companies are taxed on their capital, and not on the shareholder, at the same rate as other personal property in the state. There is not much danger to be apprehended of a discriminating tax in their favor, prejudicial to the rights or property of the citizen, and, of course, to the rights of the shareholders in these national banks, who stand on the same footing." The court here also cites with approval the case of *Van Allen v. Assessors*, *supra*, to the effect that the tax on the shares is not a tax on the capital of the bank. And again, in the case of *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, the allegation was made that the shares of national bank stock were taxed at a rate which was in excess of the tax levied upon other moneyed capital of the state. The statute of Iowa taxed savings banks, one of which was in the same town with the national bank, on the amount of the paid-up capital of the savings bank, and did not tax the shares of its individual stockholders, while the shares of national bank stock were taxed to the individual stockholders, and assessed at the same rate as other personal property. The court, by MR. JUSTICE MILLER, upholding the validity of the tax, observed: "The proposition of counsel seems to be that the capital of savings banks can be taxed by the state in no other way than by an assessment upon the shares of that capital held by individuals, because, under the act of congress, the capital of the national banks can only be taxed in that way. It is strongly urged that in no other mode than by taxing the stockholders of each and all the banks can a perfect equality of taxation be obtained. The argument is not conclusive, if the proposition were sound; for the act of congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national banks shall not be

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taxed at a higher rate than other moneyed capital in the hands of individuals. That this does not mean entire equality is evident from the fact that, if the capital of the national banks were taxed at a much lower rate than other moneyed capital in the state, the banks would have no right to complain, and the law in that respect would not violate the provisions of the act of congress for the protection of national banks. * * * If, then, neither the necessary, usual, nor probable effect of the system of assessment discriminates in favor of the savings banks against the national banks upon the face of the statute, nor any evidence is given of the intentions of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional." See, also, *Hepburn v. School Directors*, 23 Wall. 480; *Bank v. Waters*, 7 Fed. 152; *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826.

Recurring to the question of inequality in the rate of assessment and taxation, it may be observed that a refined calculation will oftentimes be confusing in the assessment of different classes of property by different regulations. Thus, for an illustration, when a corporation in this state is assessed upon its capital and franchise together, should it have money in its possession, such money is listed and taxed. The bank, as such, does not list any money or any other personal property to the assessor. The individual citizen who has promissory notes and other credits in his possession must list them for such assessment and taxation. No inquiry is made as to what assets the bank may own or possess other than real property. Thus, it cannot be shown that there is any inequality, merely when the different methods of assessment are stated; but certainly, as between the individual shareholder of a national bank, when taxed upon his shares as other personal property, and the individual citizen, who is taxed upon all personal property owned by him, there is no unjust discrimination. The appellant,

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the bank here, is merely the trustee and representative, for convenience, of its individual shareholders. They, for the purposes of this suit, are the real parties in interest. And, finally, it may be observed that appellant's complaint does not show that the other corporations, the stock of which is held by appellant as aforesaid, are moneyed corporations. We therefore conclude that the judgment of the superior court is correct, and it is affirmed.

DUNBAR and ANDERS, JJ., concur. GORDON, C. J., dissents.

SOMERSWORTH SAV. BANK

v.

TOWN OF SOMERSWORTH.

(*Supreme Court of New Hampshire, March 13, 1896.*)

Savings Banks—Double Taxation.*—Where a savings bank had paid the lawful tax upon the general deposits on which it paid interest, the taxation of bank stock which it purchased with a portion of such deposits was illegal, being double taxation.

Same—Taxation—Equality.—The New Hampshire savings bank tax is an anomaly, and has acquired the position of an exception to the constitutional rule of equality.

PETITION for an abatement of taxes. *Tax abated.*

William F. Russell and Streeter, Walker & Hollis, for plaintiff.

David R. Pierce, for defendant.

PER CURIAM. A savings bank "shall pay to the state treasurer annually, on the first day of October, a tax of three-fourths of one per cent. upon the amount of the general deposits on which it pays interest, after deducting the value of all its real estate wherever situated and the value of all its loans secured by mortgage upon real estate situated in this state made at a

Savings Banks—
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*See note at end of case.

Note

rate not exceeding five per cent. per annum." Laws 1895, c. 108, § 1. The plaintiff's fully complied with this requirement, and ask to be relieved from a further tax upon bank stock which they purchased with a portion of the deposits. The stock in fact represents the deposits which were used in its purchase, and to sustain both forms of taxation would be to sanction an unauthorized system of double taxation. *Nashua Sav. Bank v. City of Nashua*, 46 N. H. 389; *Rockingham Ten Cents Sav. Bank v. City of Portsmouth*, 52 N. H. 17; *Banks v. Concord*, 68 N. H. —, 44 Atl. —. The claim that the statute limiting the rate of taxation of deposits in savings banks is unconstitutional is not sustained. "The savings-bank tax is an anomaly, resting on peculiar grounds of public policy, and is univer- ^{Same—Taxation} ^{—Equality.} sally understood to have acquired the position of an exception to the constitutional rule of equality." *Boston, C. & M. R. R. v. State*, 62 N. H. 648, 649. On this ground, chapter 108, Laws 1895, is valid, so far as its validity is a question in this case. Tax abated.

NOTE.

Savings Banks — Taxation of Property — Double Taxation. — In *Savings Bank v. New London*, 20 Conn. 111, it was held that bank stock owned by a savings bank was liable to taxation in the place where its office was established in the absence of any clause of exemption in its charter, and that the fact that depositors of sums exceeding \$250 were also liable to taxation upon the excess and that consequently a case of double taxation arose did not affect its liability. But later decisions adopt a contrary view. Thus in *Worcester Co. Inst. v. Worcester*, 10 Cush. (Mass.) 128, it was held that savings banks are not taxable for bank stock in which they have invested money received on deposit, as the several depositors were taxable as for money at interest; and in *Providence Inst. for Sav. v. Gardiner*, 4 R. I. 484, the court held, following *American Bank v. Mumford*, 4 R. I. 478, that bank stocks, in which a savings institution had invested its deposits, for income, could not be taxed to the corporation, as such stocks represented the deposits which under the

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statute were taxable to the depositors in the towns where they respectively resided, and there was nothing in the statute to warrant double taxation. Similarly, in *State v. Sterling*, 20 Md. 502, it was held that as charitable corporations assessed for less than \$15,000 and persons assessed for less than \$50 and also United States bonds were exempt, the deposits of such persons and corporations, and also those invested in, and represented by, such bonds were not taxable under a statute imposing a tax upon the aggregate amount of the deposits. In the same case it was also held that deposits invested in stocks of corporations, whose officers were required to pay the tax thereon, and in state bonds or stocks, from the interest on which the tax was deducted, were not subjected to taxation. This decision was subsequently disapproved in *State v. Cent. Sav. Bank*, 67 Md. 290, on the ground that the tax imposed by the statute was imposed upon the corporate franchises and not upon the property of the bank; but the principle involved in it was followed and it was held that deposits invested in ground rents payable from property upon which taxes had been paid by the owners were not subject to taxation under a statute providing that the officers of each savings bank should "furnish to the comptroller * * * the aggregate amount of deposits in such corporation, and should pay to the treasurer * * * out of the interest due the depositors the state tax on said deposits."

Under the *New Hampshire* Statute of 1869, ch. 4, all the deposits and accumulations in the several savings banks in that state, however such deposits and accumulations may be invested, are to be taxed to the banks; and such taxes are to be paid to the state in the first instance. And such deposits are not liable to any other tax. Under this statute, real estate purchased with the deposits and accumulations of the bank, is not subject to taxation as real estate in the place where the same is located. *Rockingham Ten Cents Sav. Bank v. Portsmouth*, 52 N. H. 17.

In *Nashua Sav. Bank v. Nashua*, 46 N. H. 389, it was held that real estate belonging to a savings bank is taxable in the town or place where the real estate is situated; but that if a savings bank owns stock in another corporation, the bank is not taxable in the town or place where the bank is situated.

The concluding clause of U. S. Rev. Sts., § 3408, exempting from taxation deposits of money in savings banks, exempts from tax all deposits to the extent to which they are invested in U. S. securities, and also to the extent of \$2,000. *German Sav. Bank v. Archbold*, 104 U. S. 708.

Speckert v. German Nat. Bank

SPECKERT *et al.**v.*

GERMAN NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit.)

Action against National Bank—Right of Receiver to Remove to Federal Court.*—After an action for tort had been commenced against a national bank, it was put into the hands of a receiver, by order of the comptroller of the currency, and, at the receiver's instance, he was made a party to the action, and moved for the removal of the cause to a federal court. *Held*, that the receiver was not a necessary party to the action, although admitted to defend in the interest of his trust, and, therefore, could not remove the cause to a federal court.

APPEAL by plaintiffs from the circuit court of the United States for the District of Kentucky. *Reversed.*

John L. Dodd, for appellants.

A. P. Humphrey, for appellee.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. On April 4, 1894, the appellants commenced this action in the Jefferson circuit court of Kentucky against the German National Bank and others. The bill alleged that the defendants had entered into a conspiracy to induce the complainants to subscribe to stock in the Louisville Deposit Bank, and, to that end, had made certain false and fraudulent representations in reference thereto. The Deposit Bank had become involved, and its assets had been diverted, as was alleged, to pay certain debts of one Moses Schwartz, who was charged as a co-conspirator with the German National Bank. On January 14, 1895, the answer of the German National Bank was filed. Proofs were taken, and the cause prepared for trial. In January, 1897, the German National Bank was put into the

*See note at end of case.

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hands of a receiver, by order of the comptroller of currency. On June 28, 1897, the receiver filed an application to be made a party to this suit in the state court, which application was granted, and the receiver was duly made a party to the action. Thereupon the receiver filed a petition to remove the cause from the state court to the United States circuit court for the district of Kentucky. The state court made an order granting the petition and accepting the bond. October 4, 1897, on the filing of the transcript in the circuit court of the United States for the district of Kentucky (85 Fed. 12), plaintiffs moved to remand the case to the state court. On February 8, 1898, the court overruled this motion. Thereafter an amended bill of complaint was filed, which was demurred to by the German National Bank and the receiver. On October 3, 1898, the demurrer was sustained, and upon the 15th of the same month, plaintiffs having declined to plead further, the bill was dismissed.

Upon the appeal two questions are presented: Should the circuit court of the United States have maintained jurisdiction of the case? Second, should the demurrer to the bill as reformed have been sustained? We find it necessary to consider only the first of these questions. An elaborate and able argument has been made by counsel for appellees as to the rights of receivers of national banks to prosecute original actions in the federal courts, and to remove cases commenced against them from the state to the federal courts. We do not think it necessary to enter upon a consideration of the rights of receivers of national banks in such actions, and the only question presented of record which we deem it necessary to decide is whether a receiver, under the circumstances shown in this case, having been admitted as a party in the proceeding in the state court, has any right to remove the case. By the act of July 12, 1882 (22 Stat. 162, c. 290), cutting down the federal jurisdiction in cases where national banks are parties, it was provided as follows:

“That the jurisdiction for suits hereafter brought by or against any association established under any law providing

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for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun."

In *Bank v. Cooper*, 120 U. S. 779, 7 Sup. Ct. 777, 30 L. Ed. 816, it was held by the supreme court that the act of 1882 prohibited the acquiring of federal jurisdiction by removal, as well as by original suit. See, also, *Petri v. Bank*, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144.

Section 4 of the act of March 3, 1887, re-enacted August 13, 1888 (25 Stat. 433, c. 866), provides:

"All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between the individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the state wherein they are located, and to prevent the removal of cases to the federal courts by national banks because of their organization as federal corporations. National banks now have the same right to bring suit in the federal court that any citizen has, and the jurisdiction of the federal court is not enlarged in their favor, or right of removal granted to them in actions against them. It is conceded that the bank had no right to removal in this case. There is

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no diversity of citizenship or other grounds upon which removal could have been had by it. Had the receiver a better right of removal? In the case of *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 384, 20 L. Ed. 840, it was held that a suit could be maintained by the creditor of a national bank in a state court, and that it might be prosecuted, after the failure of the bank, without making the receiver a party. In this case it is held that a creditor of a national bank may resort to a state court for an adjudication of his claim, and such adjudication is conclusive upon the receiver. In *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189, it was held that, while the receiver of an insolvent national bank may interpose in a suit to enforce a claim against the bank, he is not necessarily a party to the suit; that a judgment in such suit, to which he is not a party, is binding upon the receiver, in the absence of fraud or collusion. In *National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437-440, 24 L. Ed. 176, it was held that claims against an insolvent bank, whose validity are established by a judgment in a court of competent jurisdiction, and claims that are proven to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank was sustained, although the receiver was not a party thereto. In *Bank v. Colby*, 21 Wall. 609, 22 L. Ed. 687, it was held in a suit against a national bank, where its property had been attached at the suit of an individual creditor, that the receiver might intervene in order to discharge the attachment. In that case the corporation had been dissolved by decree of the district court of the United States, and it was held that, in view of that fact, the suit against the bank had abated.

We have therefore reached the conclusion, in the light of these authorities and the construction of the statutes applicable to this case by the supreme court of the United States, that the receiver, after his appointment, was a proper party to the action, and being vested with the property of the bank and required to look after its interests, with a view to the

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conservation and distribution of its assets, was properly admitted by the state court to defend the action brought against it. While this is true, he was in no sense a necessary party, and the action could have been prosecuted without his presence, and the judgment rendered in the action would have been conclusive against him as well as the bank. The question upon which the case turns, in our view, is, can a receiver, under the circumstances of this case, not being a necessary party to the action, but having been admitted to defend in the interest of his trust, remove the cause to the federal court? In view of the decisions of the supreme court in analogous cases, we are constrained to hold that he cannot. We have not been cited to any cases exactly in point in the supreme court, but find adjudications establishing the proposition that one who comes voluntarily into an action is subject to the disabilities of the parties already in the case as to the right of removal. In *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. Ed. 186, it was held, in a suit in equity involving title to real estate and priority of liens pending in a state court, where the highest court of the state had decided some of the points in controversy, and had remanded the case to the court below to have other issues determined, and where one who became interested in the property by grant from one of the parties to the suit had intervened to protect his rights at a time when the right of removal had expired as to all parties, that the intervention of such party was to be regarded as incidental to the original suit, and that he was subject to the disabilities resting on the party from whom he took title; and that, the right of removal having expired before he intervened, his right of removal was also barred. In *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; *Cable v. Ellis*, *supra*, was approved, and the court, speaking through MR. CHIEF JUSTICE WAITE, said: "A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned." See, also, *Jefferson v. Driver*, 117 U. S. 272, 6 Sup. Ct. 729, 29 L. Ed. 897. It is urged in the argument

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by counsel for appellees that these are cases where a person voluntarily comes into the suit after the right of removal has expired, and, being substituted in the case, has no higher right than the original party to the suit. It is said that receivers of national banks have higher rights to stand upon than the bank itself. This may be true in some instances, yet in the present case we are not advised of any defense to the claim in question which the bank could not have made as well as the receiver. The receiver succeeds to the interest of the bank, and his right to defend against this claim is no broader than that of the bank itself.

It is also true that, under the statutes of the United States as they now stand, the bank never had any right to the removal of the cause, and therefore the case is not precisely analogous to those cited, in which the supreme court has held that, the right of removal having expired in favor of the original party, the substituted party comes into the case subject to the disabilities of him whose place he takes. But the receiver comes into an action duly prosecuted in the court of the state, with all the necessary parties, to a final and conclusive judgment. His presence is voluntary, and not essential to a determination of the controversy. The conclusion that we reach is that the receiver, not coming into the cause as a necessary party, although properly admitted for the purpose of controlling the defense, the case involving property in which he was largely interested as a trustee, had no right of removal. The federal statutes, giving a receiver the right to remove, apply to cases where the receiver is a necessary party to the action, whether the suit is commenced against him originally or otherwise. This decision is in harmony with a case admittedly in all respects like the one under consideration, decided in the circuit court of appeals for the Eighth circuit. *Bank v. Smith*, 19 C. C. A. 42, 72 Fed. 568. The judgment of the circuit court is reversed, and the cause remanded, with directions to remand the same to the state court from whence it was removed, the receiver, out

Note

of the funds in his hands, to pay the costs in the circuit court and in this court.

NOTE.

National Banks—Actions against Receivers.—National banks are the creation of the federal statutes ; the federal courts have jurisdiction of actions or proceedings to which their receivers are parties if they become insolvent. U. S. R. S., §§ 5133 to 5166. In case a national bank becomes insolvent, the proceeding to wind it up and distribute its assets among its creditors and stockholders is a proceeding in which the comptroller appoints a receiver as a matter of course. U. S. R. S., § 5234. But federal courts may appoint a receiver at the suit of a judgment creditor, or stockholder, in a proper case, and a State court has also appointed a receiver in such an action. 6 Thompson Comm. on Corp., § 7262, and cases there cited. To such receiver is committed the collection of all obligations of the bank, the enforcement of all demands in favor of the bank, even by suit, if necessary ; the comptroller through him usually makes distribution of the assets of the bank among, first, the creditors of the bank according to the priorities and natures of their claims, and, second, the stockholders of the banks, if there be anything to distribute among them. *Scott v. Armstrong*, 146 U. S. 499 ; U. S. R. S., § 5234, and 19 Stats. L. 63 ; 1 Sup. U. S. R. S., p. 107. In case the assets of the bank are not sufficient to satisfy the demands of the creditors, the stockholders may be compelled by the receiver, by action, to pay an assessment upon their stock, equal to the par value thereof. U. S. R. S., §§ 5151 and 5234, and 1 Sup. U. S. R. S., p. 107. In like manner, the receiver may compel the directors of a bank, where they have been negligent in performing their duties, to make good any waste of the funds of the bank which can be traced to such negligence. But actions against directors require such proof of negligence on the part of the directors that they are difficult to maintain. *Briggs v. Spaulding*, 141 U. S. 132.

A suit against a national bank to reach property held as a part of its assets by its receiver, appointed by the comptroller of currency, is one arising under the laws of the United States, and may be removed into the federal court. *WHEELER, J.*, said : "The orator insists that the suit is against the bank, and not against the receiver ; and relies upon *Whitemore v. Bank*, 134 U. S. 527, to show that this court has no jurisdiction. In that case the bank was not in the hands of a receiver, but was *sui juris*. This bank is altogether in the hands of the receiver, and the decree sought, if it would reach any-

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thing, would reach assets of the bank in his hands. Although the bank, as an organization, is not extinguished, but is continued in existence for the purpose of being wound up, it has no control, as a bank, of any of its property interests, and cannot, apart from the receiver, be affected by a decree to reach them. The receiver is the real party in this behalf. He is an agent of the United States, and an officer thereof for this purpose. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498. The assets in his hands belong to the United States for distribution among those entitled to them. *Hitz v. Jenks*, 123 U. S. 297." *Sowles v. First Nat. Bank*, 46 Fed. Rep. 513.

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(*Circuit Court of Appeals, Eighth Circuit, Oct. 30, 1899.*)

National Banks—Stockholders' Liability—Defenses—Fraud by Vender of Stock—Corporate Creditors.* Even though a stockholder in a national bank has been induced to become such through fraud which would render his purchase or subscription voidable as between himself and the bank, yet, if he has knowingly permitted himself to be registered upon the corporate books as a shareholder prior to its insolvency, and has remained such for any considerable length of time, and until its insolvency has intervened, he cannot then be permitted to rescind his purchase or subscription, so far as the corporate creditors are concerned.

Same—Same—Same.—The fact that a national bank acquired shares of its own stock by the unlawful use of its funds is no defense in a suit by its receiver against the holder of such shares to recover an assessment on the stock which was levied solely for the benefit of the bank's creditors.

Same—Same—Set-Off.—In such a suit, a defendant stockholder cannot offset against the stock assessment damages incident to the fraud of the bank in inducing him to become a shareholder.

ERROR by defendant to the circuit court of the United States for the District of Kansas. *Affirmed.*

*See note at end of case.

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The suit was brought by Theoderic B. Wallace, as receiver of the Missouri National Bank of Kansas City, Mo., the defendant in error, against Charles J. Lantry, the plaintiff in error, to recover an assessment, in the sum of \$20,-

Case Stated.

000, which had been theretofore duly assessed by the comptroller of the currency against said Lantry as the owner of 200 shares of stock in the Missouri National Bank of Kansas City, Mo., which had previously become insolvent. The complaint was in the usual form, and alleged that said bank was duly incorporated under the act of congress of the United States relative to national banks; that it had become insolvent; that Theoderic B. Wallace was duly appointed receiver of said bank by the comptroller of the currency on December 3, 1896; that an assessment of \$100 per share had been made by the comptroller of the currency on July 30, 1897; that the defendant Lantry was the owner of 200 shares of the stock of said bank; and that by virtue of the aforesaid assessment he has obligated to pay to the receiver the sum of \$20,000, with interest at the rate of 6 per cent. per annum from August 30, 1897. The defendant below filed an answer containing two defenses, separately stated, and a counterclaim. In the first defense it was alleged, in substance, that the defendant on April 18, 1896, purchased 200 shares of stock in the aforesaid bank, and received a certificate therefor; that the stock so purchased was represented by D. V. Rieger, the president of the bank, to be the property of the bank at the time of the sale, which the bank had theretofore lawfully acquired; that he was induced to make the purchase by certain false and fraudulent representations which were made by said president and other officers of the bank concerning its financial condition, which false representations were set out at great length in the answer; that the stock was held by the defendant from the date of its purchase on April 18, 1896, until December 3, 1896, when a receiver of the bank was appointed on account of its insolvency; that after the appointment of a receiver that officer had exclusive control of all the books, papers, and assets of

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the bank, and repeatedly assured the defendant when he applied for information that the bank was solvent, and would pay all of its debts and liabilities without recourse against the stockholders; that the defendant was lulled into security by such statements of the receiver, and by reason thereof did not gain access to the books and papers of the bank until on or about September 1, 1897, at which time he was given access to the books and records of the bank by direction of the comptroller of the currency; that thereafter he discovered the falsity of all of the statements and representations on the faith of which he had been induced originally to purchase the aforesaid stock, and that he thereupon, on or about October 27, 1897, called at the prior place of business of said bank, and there tendered to the receiver, who was in charge of said bank, the certificate for the 200 shares of stock which he had received and demanded of said receiver that he should repay to him the sum of \$20,000 which he had paid for said stock, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that sum. For a second defense the defendant repeated all of the averments which were contained in his first plea, and in addition thereto he averred, in substance, that the president and cashier of the Missouri National Bank of Kansas City had acquired the stock which was eventually sold to him in the following manner, that is to say: That they had purchased the stock with the funds of the bank from other shareholders when the bank was insolvent, to prevent such other shareholders from throwing the stock on the market at ruinous prices, and thereby disclosing to the public the true condition of the bank; that the stock, when so purchased with the funds of the bank, had been transferred to clerks and other agents of the bank, to conceal the character of the purchase; that such pretended purchasers had then given notes to the bank representing the amount of money that had been expended by the bank to acquire the stock; that the persons who thus gave notes to the bank representing the money that it had so expended were totally insolvent, and never intended to pay their said

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notes; that all of these facts were concealed from the defendant until long after his purchase of the 200 shares of stock in question; and that the stock so as aforesaid sold to him was a part of certain stock amounting at its par value of \$80,000, which the bank had so unlawfully acquired, whereas at the date of his said purchase, and long afterwards, he believed it to be stock that the bank had lawfully acquired, and had a good right to sell. The counterclaim which the defendant interposed was in the nature of a cross action against the Missouri National Bank to recover the damages which the defendant had sustained by reason of the fraudulent representations that had been made by its officers to induce the sale of the aforesaid stock, and such damages were pleaded as an offset against the comptroller's assessment. These defenses were adjudged insufficient on demurrer (C. C.; 89 Fed. 11, 1023), whereupon a judgment by default was rendered against the defendant below in the sum of \$21,550; he having declined to plead further. The writ of error which was sued out by the defendant below presents the question whether the demurrer to the answer was properly sustained.

C. N. Sterry (*Eugene Hagan* and *I. E. Lambert*, on the brief), for plaintiff in error.

William C. Cochran (*J. McD. Trimble* and *W. H. Wallace*, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

While the defendant's answer is unusually lengthy, and contains many allegations showing that he was grossly deceived as to the financial condition of the Missouri National Bank by the false and deceitful statements of its officers when he was induced to become a purchaser of its stock, and that he was not guilty of negligence up to the time the bank failed, in failing to discover that he had been defrauded, yet, when the answer is carefully analyzed, it is manifest that the defendant seeks to escape from the assessment on two

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principal grounds: First, on the ground that he has lawfully rescinded the contract by which he purchased the stock, and reinvested the bank with the title thereto; and, second, on the ground that he never became the owner of any stock in the bank, because the bank had wrongfully acquired it from other shareholders when it was in an insolvent condition.

It will be observed from the foregoing statement that the answer shows that the defendant became a registered shareholder of the insolvent bank on April 18, 1896, when it was a going concern, and that he remained such until it was placed in liquidation by the comptroller about eight months thereafter, to wit, on December 3, 1896. From the very nature of the business in which banks are engaged, it must be presumed that between the last-mentioned dates the Missouri National Bank incurred large obligations to depositors and to other creditors. Besides, the answer alleges, among other things, that one of the reasons which was assigned by the officers of the bank for soliciting the defendant to become a stockholder therein was that he was a man of large means, with an extensive acquaintance in Kansas, whose connection with the bank would attract to it a large amount of patronage from that state. It must be assumed, therefore, that there are many creditors of the insolvent bank, who are now represented by the receiver, who became such subsequent to April 18, 1896; and it is probably true that there are some persons who became creditors of the concern because of the defendant's connection therewith as a large stockholder. It is immaterial, however, to the present discussion, whether the answer does or does not show that certain persons became creditors of the bank after April 18, 1896, in reliance on the fact that the defendant had become one of its shareholders, since the creditors of a bankrupt company are entitled to nothing less than its whole outstanding capital stock as a fund for the payment of their claims, and because all persons are, in law, presumed to extend credit to corporations, and especially to national banks, whose shares are subject to a double assessment, in reliance upon the amount of their

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issued capital stock, although they do not know accurately by whom such stock is at the time held. Moreover, a creditor of a corporation, when he becomes such, is under no obligation to ascertain what representations, if any, may have been made to the stockholders of the company to induce them to become such. *Pauly v. Trust Co.*, 165 U. S. 606, 611, 17 Sup. Ct. 465, 41 L. Ed. 844; *Upton v. Englehart*, 3 Dill. 496, 504, Fed. Cas. No. 16,800. These considerations lead to the conclusion that, within the rule which was enunciated by this court in two recent cases (*Scott v. Latimer*, 60 U. S. App. 720, 33 C. C. A. 1, 89 Fed. 843, and *Bank v. Newbegin*, 40 U. S. App. 1, 20 C. C. A. 339, 74 Fed. 135, 33 L. Ed. 727), the defendant's effort to rescind the purchase of the stock in question was wholly ineffectual, and cannot be permitted to release him from the assessment which was made by the comptroller of the currency, so far as the creditors of the insolvent bank are concerned. In the *Latimer Case* it was decided, in substance, that the receiver of an insolvent bank, in suits of this character, is armed with all the rights of creditors, which are very different from those of the corporation itself; that the liability of the stockholders of national banks to an assessment, in case of corporate insolvency, is a liability created by statute for the sole benefit of creditors; that the liability does not grow out of any contract between the corporation and its shareholders; and that, in the very nature of things, it is a liability which cannot be released or discharged by any agreement between the corporation and its shareholders. It was also held in that case that even though a stockholder has been induced to become such through fraud which would render his purchase or subscription voidable as between himself and the corporation, or as between himself and the party from whom he acquired his stock, yet, if he has knowingly permitted himself to be registered upon the books of the corporation as a shareholder prior to its insolvency, and has remained such for any considerable length of time, and until insolvency

National Banks—
Stockholders'—
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supervened, he cannot then be permitted to rescind his purchase or subscription, so far as the corporate creditors are concerned. In the Newbegin Case this court recognized the right of the shareholder, who was then seeking a rescission of his subscription on the ground of fraud, to rescind, under the peculiar facts of that case, inasmuch as it appeared that all the creditors of the bank who were entitled to object to the rescission had been paid, or had waived their right to object to the rescission; but in that case it was distinctly held that the right to rescind a subscription for stock should be denied to a stockholder who is registered as such when insolvency happens, if he has been a stockholder for any considerable period, or if debts remain unpaid which have been contracted since his subscription or purchase was made. It results, therefore, from the previous decisions of this court to which we have referred, that the first defense which was pleaded by the defendant in his answer was without merit, and that the demurrer thereto was properly sustained.

In considering the second defense which was interposed by the defendant, it is important to bear in mind that the 200 shares of stock which he purchased from the bank was not void stock, but was stock which, according to the averments of the answer, had once been issued to other persons, and had been reacquired by the bank by purchasing it from such other persons to prevent them from throwing it on the market at ruinous prices. It is necessary to infer from the averments of the answer that this stock had once passed the scrutiny of the comptroller, and had been outstanding and had been held by other persons since the organization of the bank in the year 1891. The purchase of this stock by the bank, under the circumstances disclosed by the answer, was doubtless *ultra vires*, but the purchase in question did not render the stock void. In purchasing it the bank made an unlawful use of its funds, for which the officers concerned in the transaction could have been held responsible, as for any other unlawful act, if the corporation had sustained damage;

Same—Same—
Same.

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but, in the point of fact, by the sale of the stock to the defendant that portion of its capital which had been dissipated by the purchase was restored by the resale, and no loss seems to have been incurred. We are at a loss to understand how this transaction on the part of the bank can operate to relieve the defendant from his liability as a stockholder in a suit brought by the receiver to recover a stock assessment which was levied solely for the benefit of corporate creditors. The sale of the stock to the defendant after the bank had purchased the same was not unlawful, since it operated to restore that part of the capital that had been retired, and to that extent repaired the wrong which might otherwise have been done to the bank's creditors. *Bank v. Stewart*, 107 U. S. 676, 678, 2 Sup. Ct. 778, 27 L. Ed. 592. In the case last cited it was also decided that if a national bank wrongfully acquires its own stock, as by making a loan thereon, no one but the government can be heard to complain after the contract has been fully executed; and in the case at bar the purchase of the stock was fully consummated, and was no longer executory, when the sale was made to the defendant. Inasmuch, then, as the stock was not void, and the sale of the same to the defendant was not prohibited by law, we are of opinion that the defendant has no greater right to shield himself from his statutory liability to creditors because of the wrongful conduct of the bank in purchasing the stock from other shareholders, than he has to shield himself from liability because his purchase of the stock was induced by the fraudulent representations of the bank's officers. The creditors of the bank, who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder, or by the further fact that the bank had wrongfully acquired the stock which it subsequently sold to him, when it appears that he knowingly became a registered shareholder, and remained

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such for eight months, and until insolvency supervened, and in the meantime enjoyed all the rights and privileges incident to that relation. The equity of the corporate creditors under such circumstances is superior to that of the stockholder, and the latter cannot obtain a rescission of the fraudulent contract for the sale of the stock which would operate to the prejudice of the bank's depositors and other creditors. The second defense pleaded in the answer was therefore untenable.

Concerning the counterclaim which was pleaded by the defendant, it is only necessary to observe that the same reasons which prevent the defendant from rescinding the contract for the purchase of the stock, and thereby depleting the statutory fund for the benefit of the creditors which was created by the comptroller's assessment, will likewise prevent him from offsetting against the assessment the damages incident to the fraud and deceit of the bank. That is a claim against the bank alone, growing out of the wrongful conduct of its officers, for which the corporate creditors are in no wise responsible; and, according to well-established rules, such a demand cannot be interposed as a counterclaim in a suit where the receiver sues merely as the representative of creditors, for the enforcement of a stock liability which was created by the statute solely for their benefit, and cannot be enforced by the bank, under any circumstances, in a suit brought in its own name. In proceedings to liquidate the affairs of insolvent corporations, where stockholders are called upon to pay amounts that remain unpaid on the capital stock, it is invariably held that such stockholders will not be permitted to set off debts due to themselves from the corporation against stock assessments, and thereby secure an advantage or preference over other creditors. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483. It is obvious, therefore, that the counterclaim should be

Same—Same—
Set-Off.

Note

rejected, since the effort is to offset the bank's liability for an injury done to the defendant by the fraud and deceit of its officers against a demand which does not, and never did, exist in favor of the bank, but was created solely for the benefit of the bank's creditors. It is questionable, to say the least, whether a judgment recovered against the bank for the alleged fraud and deceit could be permitted to participate in the distribution of the fund created by the stock assessment until all contract obligations of the bank have been fully paid; but, be this as it may, we are satisfied that the cross demand in question cannot be intertained in the present action. It results from what has been said that the demurrer to the defendant's answer was properly sustained, and the judgment below is therefore affirmed.

SANBORN, Circuit Judge. I dissent from the conclusion reached and the views expressed in the foregoing opinion, for the reasons stated in my dissenting opinion in *Scott v. Latimer*, 89 Fed. 843, 857-862, 33 C. C. A. 1, 15-20, 60 U. S. App. 720, 743-751.

NOTE.

Stockholder's Liability—Fraud in Procuring Subscription as Affecting.—In *Martin v. South Salem Land Co. (Va.)*, 6 Am. & Eng. Corp. Cas., N. S., 312, the court said: "In the case of *Oaks v. Turquand*, cited above, it was held by the house of lords that, after the winding-up of a joint-stock company had commenced, a stockholder could not have his contract rescinded for fraud in its procurement. This decision was based upon the ground that innocent third parties had acquired rights which would be defeated by the rescission. In that case the decision of LORD CAMPBELL in *Henderson v. Bank*, 7 El. & Bl. 356, was approved. LORD CAMPBELL said, in that case, 'This is an application by a creditor who, upon the faith of the party, who was then a shareholder, and who held himself out to the world as a shareholder, and being one, gave credit to the bank. He has obtained judgment against the bank. There were no assets of the bank as a company, and the application now is that execution may issue against the party individually. It would be monstrous to say that he, having become a partner and a shareholder, and having held himself out to

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the world as such, and having so remained until the concern stopped payment, could, by repudiating the shares, on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the bank, who had given credit to it upon the faith that he was a shareholder. It would be a monstrous injustice, and contrary to all principle.' *Tennent v. Bank*, 4 App. Cas. 615; *Stone v. Bank*, 3 C. P. Div. 282; *Wright's Case*, 7 Ch. App. 60; *Pugh's Case*, L. R. 13 Eq. 572; 2 *Thomp. Corp.* §§ 1441, 1442; 1 *Cook, Stocks & S.* § 163.

In this country, in the absence of statutory provisions upon the subject, the rule seems to be, says Morawetz, in his work on Corporations, 'that a shareholder whose contract of subscription was obtained by fraud would be liable to contribute his share of the capital upon the insolvency of the company, so far as this may be required in order to satisfy those creditors whose claims attached before he elected to disaffirm the contract.' Section 840.

Thompson says: 'It may be concluded, from a number of American cases, that no rescission will be allowed, after the bankruptcy or insolvency of the corporation has supervened, unless under very exceptional circumstances, if at all, and, further, that the fact that a stockholder was induced to take stock by false representations is no defense in an action by judgment creditors of the corporation on his statutory liability.' 2 *Thomp. Corp.* § 1450.

Cook says, upon this subject: 'In this country the effect of corporate insolvency upon the right of a subscriber to rescind his contract for fraud has not been passed upon as often as in England. The decisions, however, clearly hold that corporate insolvency is a bar to such rescission.' 1 *Cook, Stocks & S.* §§ 163, 164.

The decisions of the courts, we think, sustain the doctrine, laid down in the text-books, that a person who has to all external appearances become a stockholder, cannot, as to creditors who may have trusted the company upon the faith of his membership, have his contract of subscription rescinded upon the ground of fraud, where he did not repudiate the contract, and take steps to have it rescinded, before the company stopped payment and became actually insolvent; certainly not, where it does not appear that he was diligent in discovering the fraud, and prompt in repudiating his contract after it was discovered. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, *Id.* 65; *Sanger v. Upton*, *Id.* 56; *Chubb v. Upton*, 95 U. S. 666; *Ogilvie v. Insurance Co.*, 22 How. 380; *Tennent v. Bank*, 4 App. Cas. 615; *Turner v. Insurance Co.*, 65 Ga. 649; *Howard v. Glenn*, 85 Ga. 238; *Scaffold v. Barnes*, 39 Miss. 399; *Iron Works v. Speed*, 59 Mich. 272."

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BUFFALO GERMAN INS. CO.

v.

THIRD NAT. BANK OF BUFFALO.

(*Court of Appeals of New York, Feb. 27, 1900.*)

National Banks—Stock—Restrictions upon Transfers—Validity of By-Law.*—A by-law of a national bank organized under the act of 1864 seeking to impose restrictions upon transfers of stock by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank is inoperative to accomplish such purpose, being inconsistent with section 36 of such act, which provides that “no association shall make any loan or discount on the security of its own shares of capital stock, nor be purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.”

Pledge.—Possession is of the essence of a pledge in order to raise a privilege against third persons.

National Banks—Stock—Equitable Liens—Bona Fide Purchasers.—Under such section, a national bank is not entitled, by virtue of such a by-law and of notice thereof printed on its certificates of stock, to have an equitable lien upon its outstanding stock declared in its favor against a *bona fide* purchaser.

APPEAL by plaintiff from appellate division supreme court.
Reversed.

This action was brought to obtain a judgment directing the defendant to transfer upon its books to the plaintiff 450 shares of its capital stock. All of these shares stood in the name of Emanuel Levi, who had, some years previously, pledged the same with, and delivered the certificates thereof to, the plaintiff, to secure the payment of his promissory notes for moneys loaned. At the time that he so pledged the shares of stock, he executed and delivered to it an assignment of the same in the usual

Case Stated.

*See note at end of case.

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form, by which he assigned and transferred to it, by name, the shares of defendant's capital stock standing in his name on the books, and constituted one of the officers of the plaintiff his attorney to effect the transfer thereof, etc. He at the same time executed and delivered to the plaintiff a receipt for the moneys loaned to him, which stated the rate of interest the loan should carry, the assignment of collateral security for its payment, and that the plaintiff was authorized, in case of default in payment of the principal and interest of the loan, to sell the securities at public or private sale, etc. Levi having died, a demand was made upon his executors for payment of the notes, with notice that, in the event the same were not paid, and the stock redeemed, on or before a certain date, the stock would be sold at public auction, and the proceeds applied in liquidation of the indebtedness of their testator. On June 30, 1896, a public sale was regularly had, at which the stock was purchased by the plaintiff. Thereafter, a demand of the plaintiff upon the defendant to transfer the stock so purchased upon its books was refused. The defendant claims a lien upon the stock by force of a statement printed upon the face of the certificates, in the following language: "This is to certify that Emanuel Levi is the owner of — shares of one hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien referred to in section 15 of the by-laws of said bank in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-law." Levi had been a director of the defendant, and at the time he pledged his stock to the plaintiff he was under an indebtedness to the defendant.

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The trial judge made this finding with respect to it: "That at the time of the sale of the stock in question to, and at its purchase by, the plaintiff, the estate of Emanuel Levi was largely indebted to the defendant, and the defendant then had and now has a right to a lien upon said certificates and stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledge of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff, or by any other person or party, has ever been made; that the plaintiff was notified of the defendant's claim before the sale of June 30, 1896, and the defendant forbade such sale except subject to the defendant's claims, demands, and liens." The defendant at no time had possession of Levi's certificates of stock, and its claim is of an equitable lien upon the same for all the indebtedness owing by him as its stockholder, by reason of the statement upon the certificates. It is also claimed that he orally stated to the defendant's president that "he had a large amount of stock in the bank, and that was security for his loans," and that, though "it was in the safe-deposit vault," the bank "could consider it there as delivered as collateral to its loan." The trial court made no finding as to these facts, nor otherwise upon the subject than the finding above given. The conclusion reached by the trial court upon the facts was, in substance, that the defendant had a lien upon the stock for the amount of the indebtedness existing against the estate of Levi, when the certificates were purchased by the plaintiff, and that the latter's right to a transfer to itself of the stock was subject to the lien of the former. Judgment was entered dismissing the complaint upon the merits, upon the sole ground that the plaintiff is entitled to a transfer of the stock in question by the defendant, and to have new certificates issued to it in place of those to be surrendered and canceled, when, but not until, it should pay to the defendant an amount sufficient to satisfy its lien for the indebtedness to it owing by Levi's estate. This judgment was affirmed in the appellate division

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by a divided court, and the plaintiff has appealed to this court.

Arthur W. Hickman, for appellant.

Adelbert Moot, for respondent.

GRAY, J. (after stating the facts). The decision of the question in this case turns upon provisions of the national banking act passed by congress in 1864, and the construction

which they should receive in the light of opinions of the supreme court of the United States. The original act for the incorporation of national

banks, which was passed in 1863, contained, in section 36, the provision that the capital stock "shall be assignable on the books of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any debt which shall have become due and remain unpaid; * * * and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864 the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in section 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. 13 Stat. 110. The act of 1864 did not re-enact any of the provisions which were contained in section 36 of the act of 1863, and the section, therefore, was expressly repealed. *Bullard v. Bank*, 18 Wall. 594, 21 L. Ed. 923. The defendant was organized under the act of 1864, and there was not only no authority in the act for the by-law referred to and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. *Bullard v. Bank*, *supra*. The

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restrictions imposed by section 36 of the act of 1863 upon the shareholders had been removed, and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank would be quite inoperative to accomplish such a purpose, and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a federal law, it should be governed in its determination by the decisions of the supreme federal court, and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the national banking act is not, in the absence of any declaration to that effect, void, or incapable of enforcement. Under the authority of certain cases in the United States supreme court, which are considered in the opinion, it was pointed out that the validity of certain transactions by national banks with their debtors was held to be a question only for the government to raise, and that the effect of their violation of the statute was not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the government. *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956. Hence it was deemed to follow that in the present case the bank's claim to be entitled to an equitable lien, though against a purchaser for value, and in good faith, of its shares in the market, must be allowed, and any offense against the banking act involved

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must be left to governmental cognizance. I believe this conclusion to be fallacious, and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases in their facts and in the principle underlying their decision, and the earlier cases which construed the national banking acts, and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Bullard v. Bank*, *supra*. I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for

Pledge of Stock. the defendant. If we assume the existence of

a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession, and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge, in order to raise a privilege against third persons. *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Wilson v. Little*, 2 N. Y. 443.

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person, and in that respect the case is unlike those cases

where the federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in viola-

tion of some express provision of the law. The defendant never had possession of the stock, and, being under the prohibition of the banking act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans, and the certifi-

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cates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto. I should say that there was a marked difference between any such claim of the bank, which slights a provision of the banking law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interest, and a claim which a borrower or his representative asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock by virtue of a by-law and of notice thereof on the certificates, when the banking act prohibited loans by it upon the security of its own shares, and thereby rendered any by-law in contravention of the act, or any notice based thereon, wholly inoperative.

In *Bank v. Lanier*, *supra*, the certificate of stock declared that the shares were transferable on the books of the bank only on surrender of the certificates. This limitation was imposed by the by-laws, which further provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the thirty-sixth section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness to it, by virtue of the provisions of the thirty-sixth section of the act of 1863, which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of congress aforesaid. It appeared

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that the bank had sold and transferred the Culver shares upon its books to a third person, and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be to make national banks subserve public purposes, and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the government, and, as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard v. Bank*, *supra*, the defendant was organized under the national banking act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from the bank on his notes, and subsequently was adjudged a bankrupt. The plaintiff, as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for, and the questions certified for determination were whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles or by-laws, and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security for all or any of the notes. It was held, on the authority of the *Lanier Case*, *supra*, that these questions must be answered in the negative. MR. JUSTICE STRONG, who delivered the opinion of the court, observed that the repeal of the thirty-sixth section of the act of 1863 by the substituted act of 1864 "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of

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their debtors," and that a by-law founded upon the thirty-sixth section of the act of 1863 was "a regulation inconsistent with the new currency act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors." It was there argued for the bank that, though the act of congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does, by its fifth section, authorize the creation of such a lien by the articles of association and by by-laws made under them. But it was answered that the words of the fifth section would bear no such meaning, and that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that congress evidently did not understand the section as extending to the subject of stock transfers, because in another part of the statute express provision was made for them.

The doctrine of *Bank v. Lanier*, was followed in this court in *Conklin v. Bank*, 45 N. Y. 665, where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank are paid." The rule of the *Lanier Case* was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that: "Where the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case, and come to the support of the defendant's position? They are *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, and *Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443. The national bank-

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ing law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase, hold and convey real estate for the following purposes, and no others: First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Bank v. Matthews*, Matthews and another person had given their joint note to a mercantile company, and secured it by a deed of trust covering certain real property, executed by Matthews alone. Subsequently the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid, and the bank directed the trustee to sell. In the state courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real-estate security, which was forbidden by the statute, and the deed of trust was, therefore, void. The case was taken by writ of error to the United States supreme court, where the decree of the state court was reversed, and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the national banking law did not vitiate real-estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the government. JUSTICE SWAYNE remarked that "the impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by congress. The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the

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government to object. See page 629. In *Bank v. Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. The question for determination was stated to be whether the mortgage was valid so far as it applied to future advances to him. The question was regarded as determined by the decision in *Bank v. Matthews*, which was reviewed in the opinion. It was observed that, "Whatever objection there may be to it, as security for such advances, from the prohibitory provisions of the statute, the objection can only be urged by the government." In both these cases the bank held the trust deed or mortgage, and was endeavoring to enforce the security which it actually had taken from its debtor.

In *Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592, the bank had taken, as security for a debt due from the stockholder, 30 shares of its own stock, and upon default in payment had sold the same, and applied the proceeds in payment of the debt. The action was brought to recover back the proceeds of sale upon the ground that the bank had no right to take the security. The right to recover was denied upon the ground that "the contract had been executed, the security sold, and the proceeds applied to the payment of the debt," and that "both bank and borrower are, in such case, equally the objects of legal censure, and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale, and the moneys loaned were an offset to the proceeds.

In *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66, 36 L. Ed. 956, the question arose upon the overcertification of a check, in violation of the United States statute which made it "unlawful for any officer, etc., of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said

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bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The statute further provided that any check so certified shall be a good and valid obligation against said bank, but that any officer, etc., violating the provisions of the act, would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. 13 Stat. 114, c. 106. The action was brought to recover the possession of certain railroad bonds, which the bank was charged with having become illegally possessed of. The bank answered that the bonds had been pledged to it as collateral security for call loans or advances, and that, the pledgors having failed to pay their indebtedness, the bonds had been sold under an agreement permitting the bank to do so upon the pledgor's default. The question was whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a *bona fide* holder of the bonds. Upon the authority of the cases of *Bank v. Matthews* and *Bank v. Whitney*, it was held that, "where the provisions of the national banking act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *Bank v. Stewart*, had been executed. *Matthews v. Bank* and *Bank v. Whitney*, only, of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States supreme court intended to announce any new rule, for they simply applied a doctrine established as early as in the case of *Fleckner v. Bank*, 8 Wheat. 339, 5 L. Ed. 638. That the *Matthews* and *Whitney* Cases have not overruled the doctrine of the *Lanier* and *Bullard* Cases or of the *Conklin* Case in this court, with respect to the enforceability of such a by-

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law as the bank had in this case, is the general understanding of text writers, and it has been so understood by courts. Cook, Stock, Stockh. & Corp. Law (3d. Ed.) § 533; Jones, Liens (2d Ed.) § 384; Thomp. Corp. (Ed. 1894) § 2319; Paine, Banking Laws, p. 533; 16 Am. & Eng. Enc. Law, p. 201, §§ 14, 15; Evansville Nat. Bank v. Metropolitan Nat. Bank, 2 Biss. 527, Fed. Cas. No. 4,573; Continental Bank v. Ellicott Bank (C. C.) 7 Fed. 376; Association v. Wiltz (C. C.) 10 Fed. 330; Feckheimer v. Bank, 79 Va. 80.

I do not understand that, by virtue of any rule established in the Matthews and Whitney Cases, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the national banking act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired *bona fide*, and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce, in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by congress upon banking associations, as it was said by MR. JUSTICE DAVIS in the Lanier Case. The learned judge further remarked, in that case: "It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession,

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and were delivered to the plaintiff; and the printed matter thereon was of no importance, inasmuch as the public law, under which the bank was organized, prohibited it from making any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited. The plaintiff, in the language of JUSTICE DAVIS in the Lanier Case, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." If the case had been one where the bank, not regarding the prohibition of the banking act, had taken from Levi his certificates of stock as collateral security for the payment of any indebtedness which he had incurred or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or any one claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Bank v. Matthews* or *Bank v. Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the government, and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors. There is no conflict between the Lanier and Bullard Cases and the Matthews and Whitney Cases. Each class is distinct, and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed, and to avoid it would be to deplete the assets of the bank to the amount represented by the contract. It is quite another thing

Note

where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute which provides that it shall not have such a lien or take such a security.

The conclusion I reach is that the cases relied upon in the court below in the decision of this case do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock; and the plaintiff, having acquired the certificates from Levi, the stockholder, for value, and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PARKER, C. J., and BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Judgment reversed, etc.

NOTE.

National Banks—Validity of By-Law Purporting to Create Lien on Stock for Debts Due Bank.—Congress having omitted from the statute of 1864 the provision previously enforced, giving national banks a lien upon stock for debts due by the stockholders, and having prohibited national banks from making loans upon the security of stock, it must be inferred that it was intended that national banks should not have the power to adopt a by-law, prohibiting a transfer of stock until all debts due by the stockholders should have been paid. *First National Bank v. Lanier*, 11 Wall. (U. S.) 369; *Bullard v. National Eagle Bank*, 18 Wall. (U. S.) 589; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. (C. Ct.) 527; *Lee v. Citizens' Nat. Bank*, 2 Cm. 299; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. (N. Y.) 495; *Delaware L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 340. Such a by-law of a national bank is invalid, although notice thereof be indorsed on the certificate of stock. *Feckheimer v. Nat. Exchange Bank (Va.)*, 5 Am. & Eng. Corp. Cas. 156; *Conklin v. Second Nat. Bank*, 45 N. Y. 655.

But in Rhode Island it has been held that a national bank has the power under the National Currency Act of 1864 to make by-laws

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providing that the shares of its capital stock shall be transferable only on its books; that no stockholder shall be allowed to sell or transfer his stock while indebted to the bank without the assent of its directors, and that the stock of any stockholder shall be held pledged and liable for the payment of any debt due from such stockholder. *Lockwood v. Mechanics' National Bank*, 9 R. I. 308. And see *In re Dunkerson*, 4 Biss. (C. C.) 227. *Knight v. Old Nat. Bank*, 3 Cliff. (C. C.) 429.

And in *Bath Sav. Inst. v. Sagadahoc Nat. Bank et al.* (Me.), 6 Am. & Eng. Corp. Cas., N. S., 486, it was held that a national bank may, by law, subject the shares of a stockholder to a lien for his indebtedness to the bank, and the assignee of such shares cannot procure a transfer of the same upon the books of the bank until such indebtedness shall have been paid.

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(*Supreme Court of Errors of Connecticut, April 4, 1900.*)

Whether Fraud of Cashier Imputable to Bank.*—In an action by a bank, as the indorsee of promissory notes, the fraud of its cashier, the indorser, by which the maker was induced to give the notes, cannot be imputed to plaintiff, it not appearing that the bank had any knowledge of the fraud, except that inferable from the fact that the fraud was that of its cashier.

APPEAL by defendant from Windham county superior court. *Affirmed.*

This case and the preceding one arose out of the same matter. They were tried together, as, in one aspect, they were but parts of the same case. There was only one finding. The part of the finding specially applicable to this case is as follows: 'The notes in question were transferred by said Risley to the bank as security of a

*See generally *First Nat. Bank of Brandon v. Briggs' Assignees* (Vt.), 1 Banking Cases 19, and *notes*, 23 *et seq.*

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loan, although it did not appear from the evidence by whom the notes in question were taken on the part of the bank, although Risley was cashier at the time. It did not appear that the bank had any knowledge of the representations made by Risley in obtaining said notes from the defendant, or of the facts relating to the issue of stock, unless the same in law can be inferred from the fact that Risley was its cashier. Neither did the defendant know that the notes were held by the bank until demand was made upon him by the receiver.

William C. Case and *Daniel A. Markham*, for appellant.

Charles E. Perkins and *Solomon Lucas*, for appellee.

ANDREWS, C. J. (after stating the facts). This action was brought to recover the amount of two notes given by Mr. Bevin, the defendant, to the Natchaug Silk Company, and by that company indorsed to the plaintiff. They are the same two notes mentioned in the preceding case as having been given by Mr. Bevin to that corporation in part payment for certain shares of its capital stock. The defense was that the said shares of stock were void; that the notes were, for that reason, without consideration; that Mr. Bevin was induced to give the notes by the fraud of Mr. Risley (all as is fully set forth in the finding and opinion in that case); that the plaintiff took the notes under such circumstances that it was chargeable with knowledge of such want of consideration and fraud, and that, therefore, it could not recover. The fraud of Mr. Risley, if there was any, cannot be imputed to the bank from the fact that he was its cashier. *Bank v. Payne*, 25 Conn. 444; *Butler v. Toy Co.*, 46 Conn. 136; *Foundry v. Dart*, 26 Conn. 382. It being decided in the former case that the said shares were not void, but were valid, the defense fails. The plaintiff is entitled to recover, and there is no error. The other judges concurred.

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KILLEN

v.

STATE BANK OF MANITOWOC *et al.**(Supreme Court of Wisconsin, April 27, 1900.)*

Corporations—Torts of Officers—Action by Creditor—Equity Jurisdiction.—A creditor of a corporation, under sections 3237, 3239, Rev. St., if, looking to the interests of its creditors, the ends of justice require or the court direct, may maintain an action in equity to redress wrongs to such corporation growing out of the misconduct of its officers, resulting in loss or waste of the corporate assets.

Banks—Misrepresentations—Loss of Deposit—Liability of Officers.*—If the officers of a banking corporation misrepresent its condition, whereby a person is led to deposit his money therein and lose it, by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, only upon the ground of deceit.

Action for Deceit—Survival—Assignability.—An action for damages for deceit does not survive at the common law, nor under any statute of this state, and therefore is not assignable.

Survival of Actions—Statute.—Section 4253, Rev. St., which provides that actions for damages done to real and personal estate shall survive, refers only to damages to specific property, not to cheats and frauds resulting in pecuniary loss.

Banks—Creditors—Officers—Trust Relations.*—There is no trust or fiduciary relation between the creditors of a banking corporation and such corporation or its officers. Such relation exists between such officers and the bank, but that between the bank and its creditors is merely the relation of debtor and creditor.

Same—Trust-Fund Doctrine.—The trust-fund doctrine, so called, under which it is held in some jurisdictions that officers of a bank are liable directly to its depositors as *quasi* trustees, does not prevail in this state.

Same—Liability of Officers—Trust Relations—Survival and Assignability of Actions.*—Officers of a bank are liable to it for official misconduct resulting in loss or waste of its property, and as a fiduciary relation exists between such officers and the corporation, such

*See notes at end of case.

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liability survives and is assignable; and the result of that doctrine is that all such liabilities pass to an assignee for the benefit of creditors by a general assignment of its property for that purpose.

Stock Subscription Liability—Assignment.—If the stockholders of an insolvent bank that has made an assignment for the benefit of its creditors, voluntarily pay into the trust fund thus created the full amount of their double liability created by law, and such additions to such fund be distributed to and received by the creditors according to their right to participate in the benefits of such liability, it is thereby discharged.

Same—Same—Rights of Creditors.*—Liabilities for unpaid subscriptions to the capital stock of a corporation pass to an assignee under a general assignment of its property for the benefit of its creditors, and they cannot participate therein in any other way than by becoming parties to such assignment.

Same—Same—Actions.—An assignment by an insolvent corporation, for the benefit of its creditors, does not constitute an action for the enforcement of liabilities of its stockholders for unpaid subscriptions to its capital stock.

Stockholders' Liability—Statute—Rights of Creditors.—Section 1755, Rev. St., relating to the liability of stockholders of a corporation to its directors, can be invoked only by creditors existing at the time of the commission of the act upon which the liability depends, and to the extent the capital stock is diminished by such violation.

Liability of Directors—Statute—Survival and Assignability of Action.—The joint and several liability of the directors of a corporation for all of its indebtedness under section 1765, Rev. St., resulting from a violation of its provisions respecting the payment of dividends, is penal in character. A right to the benefits of it does not survive at the common law or by any statute of this state, and is not assignable.

Corporations—Care Required of Officers.—The rule stated in *Association v. Childs*, 52 N. W. 600, 82 Wis. 460, respecting the degree of care the officers of a corporation owe to their principal, affirmed under the doctrine of *stare decisis*.

Same—Liabilities of Officers and Stockholders—Equity Jurisdiction.—Where the interests of all creditors who desire to invoke equity jurisdiction to enforce liabilities of officers and stockholders of a corporation are trifling in amount, or there is no good reason appearing why such interests cannot be adequately protected otherwise than by means of the exercise of such jurisdiction, the court may properly deny any right thereto.

(Syllabus by the Court.)

*See notes at end of case.

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APPEAL by plaintiff from Brown county circuit court.
Affirmed.

Plaintiff, as assignee of a claim established against an insolvent banking corporation whose affairs were in process of being settled under a voluntary assignment for the benefit of creditors, commenced this action to recover it of the stockholders and officers of the bank because of the stockholders' liability and official misconduct of such officers. The court decided the issues of fact, in effect, as follows:

The First National Bank of Manitowoc was organized in 1865 and went out of business by being succeeded by the State Bank of Manitowoc June 2, 1892, which latter bank took all the assets of the national bank and assumed its liabilities. C. C. Barnes was the president, Charles Luling the cashier, and for the greater part of the time George B. Burnett was the bookkeeper and cashier of the national as well as the state bank, and they exclusively managed such banks. John W. Barnes purchased \$2,000 of the stock of the national bank, paying par value therefor in cash, in 1886, and continued to hold it till the bank was succeeded by the state bank as hereinafter set forth. During the time John W. Barnes was a stockholder as aforesaid he was one of the directors of the bank and its vice president, but did not actively participate in conducting the business of the corporation or do anything in that regard except to sign some reports to the comptroller of the currency, represented to him to be correct by the other officers named, and by verifying such reports, or some of them, by the books. C. C. Barnes, Charles Luling and George B. Burnett all died insolvent before this action was commenced. The reputed and published capital of the bank, from the time of its organization, was less than its actual capital. Prior to 1882 the books of the bank were falsified so as to show \$60,000 of deposits, evidenced by outstanding certificates of deposit, more than the true amount, but neither that fact nor the fictitious char-

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acter in part of the bank capital was known to John W. Barnes till the suspension of the successor.

In 1891 the bank held \$60,000 of paper of the Howell Lumber Company which it had taken through Chicago banking correspondents, supposing they held collateral security therefor. The lumber company failed at the time stated and the comptroller of the currency, supposing the event would necessarily cause such a loss to the bank as to absorb its surplus, reported at \$16,000, and \$10,000 of its capital, ordered a 10 per cent. assessment on the stock, to be carried, however, on the books of the bank as accounts receivable till the amount of loss on the Howell paper could be more definitely known.

The official bank examiner had regularly examined the affairs of the bank from the time of its organization, yet had failed to discover but that the capital of the bank and its surplus were actual, as reported to the comptroller's office or to discover anything to criticise in the management of the bank. The books showed, as above indicated, when the assessment was ordered, that the bank had a full paid up capital of \$50,000, a surplus of \$60,000, and no paper condemned by the comptroller except the Howell paper, and none other on which it was supposed there would be a loss. All the paper of the bank, including the Howell paper, was supposed to be good when taken, and was taken in the regular course of business. Nothing impairing the safety of the bank was brought to the attention of John W. Barnes, except the loss on the Howell paper, and there was no way of his determining that the situation of the bank was other than what its books indicated, except by a careful and extraordinary investigation of its affairs—such an investigation as would not be undertaken or suggested by a director of a bank without some well-grounded suspicion of dishonesty of the persons in the immediate charge of its affairs.

When the assessment was ordered John W. Barnes owned 20 shares of the capital stock of the bank, Fayette Armsby 20 shares, and J. F. Pritchard 60 shares, all of whom were

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entirely ignorant of the bank's true condition or of anything affecting its safety, other than the loss on the Howell paper. The balance of the stock was owned by the managing members of the corporation before indicated, C. C. Barnes, Charles Luling and George B. Burnett. Such active members, upon the comptroller of the currency ordering the assessment, proposed to the other stockholders that an assessment of 20 per cent. upon the stock should be made; that each stockholder should give his note for the amount of his assessment; that the assessment should be reported to the comptroller of the currency, and measures be immediately taken to organize a state bank to succeed the national bank, and that the affairs of the national bank should be liquidated through the means of the new organization. In support of their proposition to change from a national to a state bank, the managing members of the corporation said, among other things, that the comptroller of the currency was too cautious, that an assessment on account of the Howell paper was unnecessary as it would all be collected and that by changing to a state bank they would have greater liberty of action in accommodating their customers and handling their business.

The result was that all of the stockholders agreed to the proposed assessment and change. A certificate of organization of the new bank was accordingly made and signed by all of the stockholders of the old bank except Armsby, who was absent, but who thereafter consented to the arrangement. The law was fully complied with in respect to the formation of a state bank. No subscription for stock was made other than by signing the certificate of organization, or money paid for stock other than what was represented in the assets of the old bank, or certificate of stock issued. Each stockholder of the old bank was treated as having an equivalent interest in the new organization, each stockholder, outside of the managing officers, supposing that his interest in the assets of the national bank was a full equivalent for a like interest in the new bank; and the stock

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of the new bank was treated as fully paid by the interests of the stockholders in the assets of the old bank.

The new corporation was organized January 2, 1892, by electing as officers and directors the same persons who held such positions in the national bank. The assets of the national bank were turned over to the new corporation in consideration of its assuming the liabilities of the national bank. Soon thereafter C. C. Barnes informed John W. Barnes, Armsby and Pritchard that the Howell paper had been fixed up, so that payment of the notes given for the assessments on stock, in anticipation of loss on such paper, would be unnecessary, and gave back their notes, which they received relying on the statement of C. C. Barnes as true.

At one time John W. Barnes, C. C. Barnes and J. F. Pritchard each gave his note to the bank for \$15,000 taking a certificate of deposit therefor, that being done to make the published reports of the bank appear favorable with those of a competing bank. Such transaction did not result in any loss to the bank or to its creditors. The national bank, for a long time before it went out of business, was insolvent, and the new bank was likewise insolvent, from the beginning to the end.

There was a studious and successful attempt on the part of the active members of the banks to prevent the other stockholders from knowing the facts in regard to the financial situation and to cause such stockholders to believe that the banks were safe and prosperous. One of the means resorted to by the management of the national bank was to vote a dividend occasionally, ostensibly out of the earnings which appeared on the books to be available therefor, and to pay the same only to the outside stockholders. The same thing was done June 17, 1893, in the new organization. At a meeting of which John W. Barnes was not notified and of which he and the other outside stockholders were ignorant, a 7 per cent. dividend was voted, none of which was paid except to such outside members. They received of the

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dividend as follows: John W. Barnes \$140, Fayette Armsby \$140, J. F. Pritchard \$420.

Prior to the making of the dividend of 7 per cent. as aforesaid Robert T. Blake deposited \$1,000 in the bank and took its certificate of deposit therefor, and after such dividend was paid he made a like deposit, taking a certificate of deposit as before, both of which certificates he held June 5, 1892, at which time the bank made an assignment to John W. Barnes for the benefit of its creditors. Thereafter Blake duly proved his claim in the assignment proceedings, and thereafter he and his assignee, the plaintiff, shared in all distributions of the assets of the bank and collections made by the assignee of the bank on account of the liability of the stockholders thereof to creditors on account of the dividend of 7 per cent. paid as aforesaid.

Shortly after the assignment John W. Barnes increased the trust fund in his hands as assignee from his private resources to the amount of \$2,140 to cover the 7 per cent. dividend received on his stock in 1893 and his statutory liability to the creditors of the corporation, all of which was thereafter distributed among such creditors, Blake receiving his proportionate share. Thereafter Barnes made a proposition to the creditors to personally purchase their claims at a price sufficient to give them 62 per cent. of the proved amount after taking account of what they had already received from the trust fund. Such proposition was accepted by all of the creditors except Blake and was carried out, the purchased claims being assigned to third persons and subsequently to the purchaser, he using, in effecting the transaction, some \$20,000 of his individual money.

April 12, 1898, Blake sold his claim to the plaintiff having first released stockholder Pritchard from all liability to the corporation or the creditors thereof on account of such claim. Thereafter, in order to fully carry out the agreement, which was executed in part by such assignment, Blake assigned to plaintiff all rights of action possessed by him to recover damages of the bank or of John W. Barnes jointly with the

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bank and others, or separately, or against any of the officers of the bank or estate of any deceased officer, and all rights of action possessed by him against such officer or officers or any of them for misconduct of any kind on their part in administering the affairs of the bank or misrepresenting its condition to him and thereby inducing him to deposit money therein and take certificates of deposit thereof when it was in fact insolvent and unsafe.

On the 1st day of August after the assignment of the Blake claim, and after John W. Barnes had become the owner of all other claims against the bank, a $12\frac{1}{2}$ per cent. dividend was paid to the creditors out of the trust funds in the assignee's hands, plaintiff being one of the beneficiaries. Prior to the payment of such dividend, all of the 7 per cent. dividend paid by the bank in 1883 had been recovered by the assignee, who had also secured a contribution to the trust fund in his hands of \$2,000 from Fayette Armsby on account of his stockholder's liability.

August 3, 1898, after the payment of such $12\frac{1}{2}$ per cent. dividend, the assignee made a full report of his administration, intending to comply with section 1701, Rev. St., which report showed, among other things, \$2,878.23 on hand, and that the dividends theretofore paid, and the money on hand, took into account the full amount of illegal dividends paid by the corporation in 1893 and the stockholder's liability of the assignee and Fayette Armsby. The account was objected to by plaintiff for want of proper itemization of sums paid as dividends and for want of vouchers for such payments, also for want of any showing that stock subscription liabilities had been forced, or any liability of the assignor and further to the allowance of compensation to the assignee for reasons specified in the objection.

October 16, 1898, this action was commenced. On the trial Barnes admitted a subscription liability on his part on account of his ownership of stock in the bank, but claimed it was an asset of the corporation and offered to submit to a charge to cover such liability in the assignment proceedings.

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On the application of plaintiff his complaint was considered amended by setting up a liability of Barnes on account of his assessment note which, was returned as before stated; and the answer of Barnes was also considered amended by pleading the statute of limitations as to such claim and alleging that, if any liability existed on account of the facts alleged in plaintiff's amendment, after the surrender of the note, it was to the corporation and passed by the assignment with the other corporate assets, for the benefit of all of the bank's creditors.

Of all the bills receivable, notes and overdrafts that ultimately turned out to be worthless in whole or in part, none were known to be of that character till after the suspension of the bank except the Howell paper, and there is no proof of any breach of duty on the part of the officers of the bank as to any of such paper, because they did not know the true character thereof. The ignorance of John W. Barnes as to the condition of the bank grew out of his reliance upon the honesty, capacity and fidelity of those in the immediate charge of its affairs, in respect to those matters which he had a right, in the exercise of his duties as a director of the bank, to leave to them as he did under the circumstances. The difficulties which caused the suspension of the bank were inherited from the national bank without any knowledge on the part of John W. Barnes or breach of duty on his part. The infirmities referred to existed in the assets of the National Bank of Manitowoc prior to John W. Barnes' connection therewith and during all the time of its existence thereafter, and without any knowledge of such situation on his part or breach of duty in failing to obtain such knowledge.

Any investigation of the affairs of either of the banks, which duty reasonably required of John W. Barnes, would not have discovered to him the difficulties referred to. The books indicated that the banks were safe. There was no difficulty with any of the paper held by the bank, discoverable by any examination or inspection thereof which John W. Barnes was in duty bound to make with the knowledge he possessed

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or ought reasonably to have possessed, regarding the financial standing of the parties liable on such paper.

The loss on the Howell paper, of \$38,000, if it had been known to Barnes, was not sufficient of itself to have suggested to him the closing of the bank as unsafe. Without any knowledge on the part of John W. Barnes, the aforesaid loss was covered in form by a note of C. C. Barnes, but if that fact had been known to John W. Barnes he would reasonably have considered such note good. It was a part of the assets of the bank at the time the Blake indebtedness accrued. Before the suspension of the bank C. C. Barnes conveyed all his estate, including his homestead and household furniture, to it, to secure his liabilities thereto, and the creditors finally realized from such security from \$11,000 to \$12,000. There was no breach of duty on the part of John W. Barnes to the bank or to Blake which resulted in any loss to the latter.

From such facts the court decided as follows :

The payment of \$2,000 by John W. Barnes into the trust funds in his hands, on account of his stock liability, and acceptance and retention by the creditors of their distributive shares thereof, satisfied such liability. The return to the assets of the bank of the dividend illegally received in 1893 and distributed to and retained by the creditors, satisfied the requisites of section 1755, Rev. St.

The payment of the dividend did not render John W. Barnes, in any event, liable as a director for the payment of the first deposit made by Blake, because such deposit antedated the dividend ; further, because the liability of a director under such a statute is penal, and a cause of action on account of such liability is not assignable.

The liability of John W. Barnes to make his stock in the bank fully paid was an asset of the bank which passed to the assignee and cannot be enforced in this action.

The account filed by the assignee and issue joined therewith by the objections filed by plaintiff, constitute an action for the enforcement of a subscription liability precedent to

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this action. Moreover, the remedy of plaintiff in the assignment proceedings is exclusive.

The surrender of the notes in March, 1892, that were given for the 20 per cent. assessment upon the stock of the national bank, did not discharge the stockholders from their liability for the indebtedness represented thereby. However, that does not concern plaintiff under sections 1755, 1765, Rev. St. because he did not become a creditor of the assignor till after such transaction. Further, his claim as to any liability under such sections is barred by the six-year statute of limitations.

There was, in any event, no breach of duty on the part of John W. Barnes to Blake after the latter's claim against the bank accrued, hence Blake's claim against Barnes, if he had any, was one arising out of false representations as to the condition of the bank at the time the latter deposited his money therein, which liability, if there was one, was not assignable.

All money that has been received, or that is recoverable of John W. Barnes in the assignment proceedings or otherwise, on account of his stock liability or the dividend paid to him in 1893, or the liability to make his stock full paid in fact, or the nonpayment of his note given for the assessment on his stock in the national bank, must be treated as a fund for the benefit of all the creditors of the bank in proportion to their claims, who have taken or may take the proper proceedings to participate in the proper distribution thereof.

Judgment should be rendered against the plaintiff dismissing his complaint and for costs in favor of John W. Barnes.

Markham & Markham and *Timlin, Glicksman & Conway*,
for appellant.

Nash & Nash, for respondent.

MARSHALL, J. (after stating the facts). It is considered that the complaint and record disclose very clearly that the primary purpose of this action was to fully wind up the banking corporation by enforcing all liabilities of directors and stockholders which existed in its favor at the time it suspended business, and, as germane thereto, to enforce the personal

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liability of stockholders, statutory and otherwise, so far as the same can be enforced in an administrative action of this kind.

The purely personal wrong to plaintiff's assignor, in that by false pretenses on the part of John W. Barnes as one of the directors of the bank, as to the safety of the institution, such assignor was induced to deposit his money therein to his damage, was not a proper subject for litigation in this case, though the findings cover that field. We apprehend that the pleader did not intend to join an action for deceit resulting in damage to plaintiff's assignor, with an action in equity to wind up the corporation and enforce, for the benefit of its creditors, the liabilities of stockholders and directors, which are the proper subjects of equity jurisdiction in such a proceeding, though the case seems to have drifted into that field. Obviously, the cause of action for deceit, if there were one, which accrued to Blake, was a purely personal right to damages to be enforced in an action at law. No other person had any interest in such cause of action. If persons other than Barnes were responsible for the deceit because they were joined with him in the administration of the bank affairs, he has no right of action against them for contribution. So there is no reason whatever for bringing that into the administrative suit, the sole legitimate purpose of which is to wind up the corporation and to enforce the liabilities of the defendants in which the creditors are entitled to participate on a basis of equality as a single class, or as classes upon a basis of equality between the members of each class, and to adjust the equities between defendants who may be liable to respond for the benefit of such creditors.

Having reached the conclusion indicated,—that plaintiff did not purpose in this action to unite and enforce a cause of action for deceit, perpetrated upon Blake by Barnes or Barnes and his associate directors, with a cause of action in equity to remedy, for the benefit of the creditors, the wrongs to the corporation and enforce the liabilities of stockholders to creditors properly cognizable in such a proceeding, for the purpose referred to ;

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and that no purely personal action can be enforced in this case,—we shall not enter upon any extended discussion of the subject of whether the evidence discloses the existence of the personal tort cause of action, or express any opinion as to whether the decision of the trial court was right on that subject, except what may incidentally be said in separating the treatment of that cause of action in the findings of the court and the arguments of counsel from the legitimate subjects of this action, and in discussing those questions that pertain to such subjects. *Gores v. Day*, 99 Wis. 276, 74 N. W. 787, and *South Bend Chilled-Plow Co. v. George C. Cribb Co.*, 97 Wis. 230, 72 N. W. 749, are cited as authority that a creditor may maintain such an action as this. They are in point so far as relates to what we say was the real purpose of the pleader here when the complaint was framed. Each of those cases was instituted to enforce wrongs to the corporation, and it was held that the right to maintain it, in the circumstances stated in the complaint, was expressly given by sections 3237, 3239, Rev. St.

While, as indicated, if a cause of action accrued to Blake against Barnes, it has no proper place in this case and was only incidentally brought to the notice of the court by the evidentiary facts regarding the proper subjects of the equitable action, it is considered that the decision of the trial court was right, that it was a purely personal right of Blake and did not pass to plaintiff by the attempted assignment thereof.

Action for
Deceit—Survival
—Assignability.

The learned counsel for appellant refer to section 4253, Rev. St., to sustain their contention that the Blake claim, considered as sounding in tort for damages, was assignable, and refer in the same connection to sections 3216, 3237, 3239 and other sections of the statutes, none of which refer to the cause of action of a depositor in a bank against one or more of its officers for deceit.

Section 4253, Rev. St., provides that “actions for damages done to real and personal estate” shall survive. It was construed in *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W.

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289, 71 N. W. 109, and the decision there rendered was recently affirmed in *Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593. As said in the *Farwell Case*, the statute was taken from Massachusetts, where, long prior to its adoption here, it was construed as referring to injuries to specific property in a physical sense only, that is, to an actual destruction or injury to or loss of specific property, and not as including mere "cheats and frauds resulting in pecuniary loss." Such construction was a part of the statute when adopted here the same as if expressed therein in the most unmistakable language. Such is the universal rule. *Draper v. Emerson*, 22 Wis. 147; *Westcott v. Miller*, 42 Wis. 454; *Dutcher v. Dutcher*, 39 Wis. 651; *Pomeroy v. Pomeroy*, 93 Wis. 262, 67 N. W. 430; *State v. Wheeler*, 97 Wis. 96, 72 N. W. 225.

The wording of section 4253 is quite different from the New York statute, where actions for damages for conspiracies to defraud and for deceit are held to be assignable. Here, "actions for damages done to real and personal estate" survive; there, "actions for all wrongs Survival of Actions—Statute. done to the property, rights or interests of another" survive. The latter language, we would say independent of authority, clearly covers actions for deceit, and the New York court so held at an early day. *Haight v. Hayt*, 19 N. Y. 464.

The language of our statute was first construed in Massachusetts in 1827, in *Holmes v. Moore*, 5 Pick. 257, where it was said that it was adopted in that state from St. 4 Edw. III. c. 7; that the construction given to it by the English courts was that it gives to the executor or administrator of an estate an action of trespass for goods owned by the deceased in his lifetime, carried away; and, by an equitable construction, for any wrong done to such property, notwithstanding it may not have been carried away; and that the statute is confined to injuries to personal estate in the sense held by the courts where it originated. Later, in 1837, in *Read v. Hatch*, 19 Pick. 47, an action for damages for inducing plaintiff, by fraudulent representations respecting the solvency of another,

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to sell property to such other—a case which, in its facts, presented the identical question here under consideration—the court, speaking by CHIEF JUSTICE SHAW, said: “It is contended that a false representation, by which one is induced to part with his property * * * to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction, and not conformable to the intent of the statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damages done to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss, cannot be regarded as a damage done to personal estate.” For further authorities on the subject see *Cutting v. Tower*, 14 Gray 183; *Leggate v. Moulton*, 115 Mass. 552; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088; *Warren v. Shoe Co.*, 166 Mass. 97, 44 N. E. 112; *Houghton v. Butler*, 166 Mass. 547, 44 N. E. 624.

The foregoing effectually disposes of the claim that John W. Barnes was liable to plaintiff for fraudulently holding out to the public that the State Bank of Manitowoc was safe, whereby Blake was induced to deposit his money therein. Whether he incurred a liability to the corporation for breach of official duty which may be enforced in this action is quite another question and one that does not appear to have been distinctly passed upon by the trial judge in his conclusions of law or definitely presented by counsel for appellant on this appeal separate from the claim that a liability accrued to Blake personally against Barnes, or Barnes and his associates, for damages for deceit. Obviously, official misconduct of Barnes to the injury of the corporation was primarily a wrong to it, which, if enforced at all, must be enforced in the right

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of the corporation. We find nothing in the learned judge's conclusions of law about such liability, though the findings of fact called for a decision on that important subject. We should say that the learned counsel for appellant also, in their presentation of the appeal, failed to distinguish between injuries directly inflicted to a person dealing with a corporation, through the deceit of one or more of its officers, for which such person may sue such officer or officers at law for his damages, but which right does not survive and is not assignable, and negligent or fraudulent conduct of officers of a corporation rendering them primarily liable to it for the loss thereby caused to such corporation. Authorities are cited, holding that the latter liability survives, to sustain the contention that the former is assignable. The one is a liability for misconduct in a fiduciary capacity, resulting, in a sense, in a destruction or loss of specific property of the principal, and is assignable as coming within the fair meaning of the survival statute in respect to an injury to personal estate. *Warren v. Shoe Co.*, *supra*. Consistent with that, such liabilities of corporate officers are deemed to be assets of the corporation and pass to its assignee or receiver, if one be appointed, in a general conveyance of the corporate assets to him. *Hurlbut v. Marshall*, 62 Wis. 590, 22 N. W. 852.

Same—Liability of Officers—Trust Relations—Survival and Assignability of Actions.

With what has been said we will pass the subject of whether the facts found disclose a wrong to the State Bank of Manitowoc for which Barnes and his associate officers are responsible and which the plaintiff may enforce in this action in the right of the corporation, till the other questions involved in this appeal are disposed of.

The foregoing covers the first three assignments of error, except in so far as they relate to the question reserved. Whatever Barnes did or neglected to do which was an actionable wrong to plaintiff's assignor, in that he was thereby induced to deposit his money in the bank, constituted misrepresentations of material facts when he knew or ought to have known the truth, and actionable purely on the ground

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of deceit. The following cases cited by the learned counsel are actions at law, by an injured party, directly against the wrongdoers to redress such wrongs: *Seale v. Baker*, 70 Tex. 289, 7 S. W. 742; *Tate v. Bates* (N. C.) 24 S. E. 482; *Stephens v. Overstolz* (C. C.) 43 Fed. 465; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384.

There are numerous cases where the distinction has not been clearly recognized, if at all, between a wrong to a depositor of a bank committed by its officers, for which they are personally liable directly to such depositor on the ground of deceit, and a wrong by such officers to the corporation for which they are liable to such corporation and through it to the creditors. *Delano v. Case*, 121 Ill. 247, 12 N. E. 676, is a good specimen of such cases. It would take too much space to review such cases and to try to bring harmony out of the confusion that would be disclosed, though we venture to say that in most instances that proceed on the ground of negligence, the purpose will be found to have been to enforce a liability in the right of the corporation. Such is *Hodges v. Screw Co.*, 1 R. I. 312, often found cited in the books. The confusion on this subject is quite well illustrated by the fact that the *Hodges Case*, a plain action to enforce a right of the corporation because its proper officers failed to do their duty in that regard, is cited in *Society v. Underwood*, 9 Bush 609, and other authorities upon which the *Delano Case* is grounded, to support the decisions there made, that officers of a bank may be held liable directly to depositors for losses of the bank to the damage of depositors, on the ground of negligence and fraud in performance of their duties to the corporation. Other cases to support the direct action of a creditor against an officer for damages to the former, because of the fraud or negligence or other actionable wrong of the latter, are based on statutes, as, for instance, *Stephens v. Overstolz* (C. C.) 43 Fed. 465.

The real principle upon which the cases are probably grounded, which hold that the creditors may sue directors to

Banks—Misrepresentation—Loss of Deposit—Liability of Officers.

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enforce a personal right against them, is that they are *quasi* trustees for such creditors under the trust-fund doctrine, so called, which, as will be hereafter Same—Trust-Fund Doctrine. shown, has no place in our system. The directors of a corporation are trustees for it and bear no other relation to its creditors than the agent of an individual to his creditors.

The fourth exception to the decision of the trial court is to the holding that John W. Barnes became the owner of the claims of creditors, other than Blake, by a purchase thereof, it being insisted by appellant that the transaction between Barnes and such creditors was a composition of their claims between them and the holder of the trust fund. We find nothing in the record to support such contention as such. The written proposition made by Barnes to the creditors was that he, individually, would purchase their claims. We find no indication in it that any party to the transaction did or could have supposed that a composition of claims for the benefit of the debtor, or the representative of the debtor, as holder of the trust fund, was contemplated. The proposition contained this language: "Subject to the conditions and at the times hereinafter stated, I will, in my individual capacity, pay, or cause to be paid, the following sums, being the costs and expenses incurred by the petitioning creditors in the proceedings hereinafter referred to;" and "To each creditor of said bank whose claim has been proved and admitted and who shall accept this proposition, a sum sufficient, with dividends, if any already received by him thereon, to make 62 per cent. of the amount proved and admitted. Upon making payment to any creditor as aforesaid, he shall assign his claim to me or to such person as I may direct." The creditors were required to sign a paper agreeing to assign their claims to Barnes personally or to his appointee. It was stipulated that the sums payable under the proposition should be due and payable from Barnes, clearly indicating that the purchase of the claims was to be a purely personal affair. The form of the assignment of the claims, prepared

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and submitted as a part of the proposal to the creditors, showed that the claims were to be assigned to Barnes personally or to his appointee. True, the words "compromise and settlement" were used several times in the papers; but it seems clear that they were not used in the sense of a composition and settlement of the claims as between the debtor and the creditors, or an extinguishment of the claims as regards the trust fund, but in the sense of a settlement of such claims as the creditors had against Barnes personally; that is, in consideration of Barnes making the creditors good for their claims against the debtor to the amount of 62 per cent. thereof, they agreed to transfer such claims to him and release him from all personal liability. In no other sense can the language of the proposition, clearly suggesting a personal purchase of the claims, be harmonized with the words "settlement and compromise" so as to give effect to all the language used in the proposal papers, within the reasonable meaning thereof and consistent with the circumstances under which the transaction occurred.

Cases cited to our attention, where a person acted as an agent for the debtor in buying up the claims against him, holding that the transaction extinguished the claims, such as *Bowen v. Holley*, 38 Vt. 574, do not apply to the facts found by the court and abundantly sustained by the evidence. It is essential to a composition that the arrangement should be between the debtor and the creditor, or him who stands for the debtor in the transaction. There must be more than one creditor, for it is the mutual agreement between creditors to make concessions to the debtor that forms the consideration to uphold the composition contract. 6 Am. & Eng. Enc. Law (2nd Ed.) p. 377, and cases cited. It will be readily seen that there was no mutual agreement here to make concessions to the debtor or to the trust fund, but a mutual agreement of creditors to sell their claims to Barnes in consideration of his personal promise to pay therefor, as indicated in his proposition.

What has been said on the subject last treated might have

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been omitted from this opinion because of the conclusions reached on other branches of the case, but as it may be important in the final winding up of the assignment proceedings, it is thought best to pass upon the question presented.

The next assignment of error combines three propositions: (a) That the contribution of \$2,000 made by Barnes to the trust fund, should be considered as paid upon his liability to the corporation on his stock instead of on his stock liability to creditors; (b) that the proceedings in the assignment do not constitute an action pending to enforce the subscription liability, which should operate to abate this action subsequently commenced to enforce such liability; (c) that Barnes is liable in this action, either on his stock liability to the corporation or his stock liability to the creditors. The trial court decided in the negative as to each of such propositions, and as to the first and last of them, at least, we fail to discover any reasonable ground to say that such decision is wrong.

It is elementary that unpaid balances on subscriptions to the capital stock of a corporation are a part of its assets for the payment of its liabilities in winding up proceedings, the same as any other property possessed by it, and that a general assignment by such corporation Same—Same—
Rights of Creditors. for the benefit of its creditors, vests the title to such unpaid balances in the assignee, and the acceptance by him of the trust carries with it the duty to collect such balances so far as necessary to pay all the creditors of the corporation and the expenses of executing the trust. *Thomp. Corp.* § 563, and cases cited in the notes; *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Cook, Stock, Stockh. & Corp. Law* (3d Ed.) § 208. It necessarily follows that creditors of a corporation that has made an assignment cannot obtain the benefit of its stockholders' liabilities on unpaid subscriptions in any other way than by becoming parties to the assignment and working out their equities through the assignee.

As to whether the \$2,000 contributed by Barnes to the trust fund should be applied on his stock liability to creditors and be held to extinguish such liability, none but an affirma-

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tive answer can be given, based on reason and sound legal principles. No other creditor had any right to an individual enforcement of such liability.

Stock Subscription Liability—
Assignment.

They were all entitled to participate in the benefits of it in proportion to their claims against the corporation, in a proceeding adapted to that end. *Coleman v. White*, 14 Wis. 700; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Booth v. Dear*, 96 Wis. 516, 71 N. W. 816. Barnes paid into the trust fund all that could have been collected for the benefit of the creditors on account of his stock liability. All creditors were parties to the assignment proceedings, and received the benefit of Barnes' contribution to the trust fund in just the proportion they were entitled by law to participate in his stock liability. No court of equity could have done more for the creditors on account of such liability than Barnes did voluntarily and by their co-operation. However irregular the proceedings were by means of which the creditors received the benefit of Barnes' personal liability to them, the fact that they received and retained it precludes them from raising any question in a court of equity as to the means by which it reached their hands. The court cannot arbitrarily say, on an appeal to conscience, that money which Barnes paid into the trust fund for one purpose, which has been fully executed for the benefit of creditors, shall be applied to some other purpose. Nothing can be plainer than that.

In view of the foregoing, the question of whether the assignment proceedings constitute an action to recover Barnes' subscription liability which is effectual to abate this action if it

could otherwise be maintained, is not material, though upon what principle it can be so considered is not perceived. The assignment proceeding is not an action in any sense. The assignee could not enforce collection of a subscription liability in the assignment proceedings as the owner of it in trust for the creditors. He could enforce it only by action. Such liabilities are mere choses in action in the hands of the assignee.

Same—Same—
Actions.

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which must be collected, if at all, in adversary proceedings by an action of some sort.

Further complaint is made because the trial court decided that the liabilities created by sections 1755, 1765, Rev. St., were not assignable. We are not able to discover that the court so decided as to section 1755. Such section requires stockholders in a corporation, who receive any refund of money paid in for the capital stock owned by them respectively, to return the same to the corporation for the payment to that extent of all debts owing by the corporation at the time the money was received by such stockholders. The court held that such section does not apply to this case because of all of the indebtedness of the bank which was owing at the time the assessment notes were returned has been paid or conveyed to the defendant Barnes, who makes no claim under it.

Stockholders'
Liability—Stat-
ute—Rights of
Creditors.

The court did hold that if the right of action accrued against Barnes in favor of Blake under section 1765, Rev. St., by reason of Barnes being officially a party to the payment of a dividend, such liability was not assignable. That section renders directors who violate its provisions jointly and severally liable to all the creditors of the corporation then existing. The decision of the trial court was that a claim under such section is not assignable because the liability is penal. A right of action to recover a penalty does not survive at the common law. That is elementary, and certainly, there is no statute covering the subject.

Now as to whether a liability under section 1765 is penal in its character, and whether the general rule that a right of action to enforce such a statute does not survive and therefore is not assignable, there is much conflict.

Counsel for appellant cite cases to support the negative of the proposition (Fitzgerald v. Weidenbeck [C. C.] 76 Fed. 695; Stephens v. Overstolz [C. C.] 43 Fed. 465), while cases supporting the affirmative are cited by respondent. Stokes v. Stickney, 96

Liability of
Directors—Stat-
ute—Survival and
Assignability of
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N. Y. 323; *Carr v. Rischer*, 119 N. Y. 117, 28 N. E. 296; *Bank v. Bliss*, 35 N. Y. 412; to which many others may be added. *Wiles v. Suydam*, 64 N. Y. 173; *Easterly v. Barber*, 65 N. Y. 252; *Veeder v. Baker*, 83 N. Y. 156; *Manufacturing Co v. Beecher*, 97 N. Y. 651.

We will not incumber this opinion with a discussion of the cases cited and the many others that might be cited, touching the subject of whether such a statute as the one under consideration is penal, considered with reference to the assignability of claims under it. If we test the statute by familiar rule,—that a statute which imposes a forfeiture or a penalty for transgressing its provisions or doing a thing prohibited (*Potter, Dwar. St. 74*; 18 Am. & Eng. Enc. Law, p. 270) is penal in character, and that if the penalty or forfeiture does not go to the public but to a person individually interested directly in the matter to some extent, the recovery for his benefit not being limited in any respect by the injury sustained by him, showing that the primary purpose of the statute is public, it is nevertheless penal,—we shall have no difficulty in reaching a right conclusion.

Under the statute in question a violation of its provisions, resulting in damages to the creditors of the corporation in such a trifling amount as not to be appreciable, may nevertheless result in the guilty party being liable directly to such creditors, for all of their claims.

The reasoning of the cases holding that such a statute is purely remedial in character, and that the liability under it is a property right that may pass by assignment, seems to overlook the fact that the primary purpose of the legislation is public and that the extraordinary liability visited upon the transgressor, without regard to the actual damages suffered by the individuals either in their primary or secondary capacity, is punishment for the wrong done, pure and simple; that such being the primary purpose of the statute the mere fact that the punishment inures to the benefit of a particular class of individuals instead of to the state, does not make the statute remedial and the liability under it an indebtedness to

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the creditor, or incident to an indebtedness of the corporation to him. What is the primary purpose of the statute? That is the question. If that is public, the liability of a person for violating it to be mulcted in a sum having no reference whatever to the loss caused to creditors thereby, cannot, it would seem, be reasonably said to be other than a penalty, merely because the beneficiaries of the liability are private persons. We recognize the fact that there is high authority against this rule, but it is in accordance with what we deem to be the weight of authority and the better reasoning.

Our conclusion is that the statute in question, section 1765, Rev. St., is penal in character, and that a liability under it is not assignable. That construction has no application whatever to the statutory liabilities of stockholders to creditors, which are contractual in character, or the statutory liability of officers of corporations for damages sustained by them by official misconduct of their officers and directors.

The principles here applied have heretofore received the sanction of this court. We could not reach a different conclusion as to the law under consideration without overruling *Cotter v. Plumer*, 72 Wis. 476, 40 N. W. 379. The law there considered was section 4269, Rev. St., fixing the measure of damages "in all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass," at "the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from him with notice." It was held that the statutory rule of damages was penal in character, and that a claim to its benefits will not survive the death of the wrongdoer. The only element in the statute that led to such conclusion was that which gives to the injured party a sum far in excess of his actual damages attributable to the wrong. The primary purpose of the statute however, manifestly was

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to discourage the wrongful cutting of timber by punishing the wrongdoer for the benefit of the injured party.

There is left to be considered the question of whether the facts disclosed by the evidence show official misconduct of the officers of the State Bank of Manitowoc, to its injury, which may be redressed in this action. That branch of the case seems to have been considered by the trial court only in respect to direct injuries to creditors by corporate officers, remedial in an action in the right of the former as *quasi cestuis que trustent* of the latter. The court said there was a species of agency between the creditors of a corporation and its directors, the relationship between them being that of *quasi* trustees; that a violation of the duties of such relationship is the subject of a direct action by the creditors against the directors. There are some authorities that support that view. They prevail in jurisdictions that uphold the trust-fund doctrine, so-called, as regards the property of a corporation, in that it is held in trust by the directors of the corporation or the corporation for the benefit of its creditors. That doctrine has very little, if any, place in our system.

The idea that officers of a corporation are in any sense, trustees of its property for its creditors has been quite recently considered in this court and disapproved in *Slack v. Bank*, 103 Wis. 57, 79 N. W. 51, where the following language from the opinion of the court in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, was quoted and approved as stating the correct rule on the subject: "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." So if, by the negligence or fraud of the officers of the corporation, its assets to some extent were lost, the liabilities to make good such loss were assets of the corporation and passed

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—Officers—Trust
Relations.

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by the assignment to Barnes for the benefit of its creditors. *Thomp. Corp.* §§ 4121, 4122; *Movius v. Lee* (C. C.) 30 Fed. 298; *Howe v. Barney* (C. C.) 45 Fed. 668. Nevertheless a creditor may maintain an action to enforce such liabilities in the right of the corporation or of the person in whom such right is vested, if the necessities of the case so require.

Section 3237, Rev. St., provides that the circuit court shall have jurisdiction over directors, managers, trustees and other officers of corporations, to order and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money of, and the value of all property, which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees or other officers; and section 3239, Rev. St., provides that the jurisdiction conferred by section 3237 "shall be exercised in an action prosecuted by the attorney general in the name of the state, or by any creditor of such corporation, or by any director, trustee or officer thereof having a general superintendence of its concerns, as the case may require or as the court may direct." It is plain that the creditor has not the absolute right to maintain such an action. Where the title to the claim for damages is in an assignee for the benefit of creditors, he is the person who should invoke the jurisdiction of the court, and a creditor cannot take his place in the matter unless the necessities of the case so require or the court so direct; and the facts in that regard, according to the settled practice, must be made to appear on the face of the complaint. The right to maintain such an action was sustained in *South Bend Chilled-Plow Co. v. George C. Cribb Co.*, 97 Wis. 230, 72 N. W. 749, and *Gores v. Day*, 99 Wis. 276, 74 N. W. 787; *Gager v. Bank*, 101 Wis. 593, 77 N. W. 920; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 925. The complaint in each case showed that the person in whom the title to the cause of action was vested was hostile to its enforcement, therefore the creditor was permitted to stand in the place of such hostile party and

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enforce the claim in his right. The same situation appears in this case.

So, though the plaintiff has no title to the cause of action to recover, of the officers of the corporation, damages caused to it by their official misconduct, if there be any actionable wrong in that regard he may properly stand in the place of the assignee, Barnes, who has such title, under section 3239, Rev. St.

Much labor was expended by the learned counsel for the appellant on the subject of the degree of care that the directors of a corporation are bound to exercise in the conduct of its affairs, at the peril of being responsible for loss to the corporation chargeable to their negligence. If the question were an open one in this state it would be profitable to consider it and discuss at some length the numerous authorities cited to our attention. It is by no means certain that the standard of care with which directors of banks should be charged is put too high in any of such cases. However, the standard for this state is deemed to be too firmly established to admit of discussion or to be changed by the action of the court alone. In *Association v. Child*, 82 Wis. 400, 52 N. W. 660, the rule for this state, based in the main on *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, was expressed thus: "As they (directors) render their services gratuitously, they are not to be held to the degree of responsibility of bailees for hire." "They are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of want of good faith." "The degree of care they are bound to exercise is that which ordinarily diligent and prudent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the usages of business and the circumstances of each particular case; they are not liable in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment, and bad management

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in making investments on doubtful or insufficient security. Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence." The learned counsel for appellant is quite justified in saying that that is as liberal a rule, at least, if not the most liberal, that can be found in the books. However, it is considered that the doctrine of *stare decisis* requires that such rule shall be adhered to. Therefore, by it, the conduct of the respondent and his associates in this case must be tested. Though it must be remembered that such rule has no application to that branch of this case regarding the charge that, by the fraudulent conduct of respondent and his associates, Blake was induced to deposit his money in the bank.

In view of what has been said we are unable to see wherein respondent was negligent to the injury of the corporation. There is no evidence of active, deliberate fraud on his part, no evidence of intentional breach of trust, no evidence that any loss accrued to the corporation through the making of loans from any other cause, at least, than mere bad judgment. We are now of course speaking of what occurred after the formation of the new bank and have no reference whatever to the defalcations which occurred during the existence of the national bank and prior to the connection of Barnes therewith. In fact there is no evidence that any money was actually lost by the corporation by any loans that were not considered good, and properly so considered, when made, no evidence that any of the assets of the corporation were appropriated by respondent or by any of his associate officers in the state bank, and no evidence that any of the infirmities which caused its final downfall could have been discovered by Barnes, by any examination which he could reasonably have made or that might have been made by the other officers, and remedied. If we say he should have discovered the fact that there was a loss on the Howell paper of \$38,000, covered by his brother's note for

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that amount, there is no evidence to impeach the finding that such loss could not have been reasonably prevented after the formation of the new bank, or that the note of C. C. Barnes would reasonably have been considered a good asset prior to the suspension of such bank; or, if the fact were otherwise, that any greater sum could reasonably have been recovered of C. C. Barnes or any of the other stockholders on their stock subscription liability, which the loss on the Howell paper developed, than was collected or is now collectible. As to C. C. Barnes, it appears that his property was all turned over to the bank and that some \$12,000 has been realized therefrom. As to the other two stockholders who were actively engaged in conducting the bank, it satisfactorily appears that they were insolvent so that nothing could have been collected from them. As to stockholder

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of Officers and
Stockholders—
Equity
Jurisdiction.

Pritchard, his liability was released as to the plaintiff's claim, by plaintiff; and as to the other two stockholders, Barnes and Armsby, the interest of plaintiff in their stock subscription liability is trifling in amount and can be amply protected in the assignment proceedings. He has no sufficient equity to call for the maintenance of this action, to realize on his small interest in the stockholders' liability of defendants Barnes and Armsby; and as there is no other creditor interested in such maintenance, the trial court properly reached the conclusion that the bill should be dismissed.

There are some questions discussed in the able briefs of the learned counsel for appellant which do not require to be noticed in this opinion in view of the conclusions reached upon the main points in the case. Each question in any way affecting the appeal, not specifically mentioned, has been the subject of careful study and investigation. The judgment appealed from must be affirmed.

So ordered.

NOTES.

Liability of Directors to Creditors.—See Union Nat. Bank of Kansas City *et al.* v. Hill *et al.* (Mo.), 1 Banking Cases 443, note 456. See

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also *Minton v. Stahlman* (Tenn.), 34 S. W. Rep. 222; *Deaderick v. Bank of Commerce*, 100 Tenn. 457, 45 S. W. Rep. 786.

Liability of Bank Directors for Negligence in Supervision of Business.—See 1 Banking Cases 564, *note*.

Assignments for Benefit of Creditors—Assignee's Power to Enforce Stockholders' Liability.—See *Beal v. Dillon* (Kan.), 6 Am. & Eng. Corp. Cas., N. S., 186, and *notes*, 193 *et seq.*

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v.

HILL *et al.*

(*Supreme Court of Missouri, March 17, 1900.*)

Appeal—Review.—The rulings of a trial court on the weight of the evidence will not be reviewed on appeal.

Banks—Receiving Deposits after Insolvency—Liability of Directors.*—Under section 2760, Rev. St. 1889 of Missouri, making bank directors individually responsible for deposits accepted, with their assent, after they have knowledge that the bank is insolvent or in failing circumstances, directors are not liable, unless it appears that they had actual knowledge, when the deposit was received, of the bank's condition, the fact that they could have ascertained its condition, had they not failed to keep posted as to its affairs, not being sufficient to render them liable.

Same — Same — Same — Estoppel.*—Bank directors, in an action against them under such statute, are not estopped to plead ignorance of its condition.

Same—False Statements of Bank's Condition—Deceit—Liability of Directors.*—Bank directors are not liable to depositors, in a common-law action for deceit, for statements as to the bank's condition made to the secretary of state, required by section 2752 of such statute, which were not true, but which they believed to be true, and which were in good faith based upon details furnished them by the cashier, whose reputation was good.

Reference—Findings of Fact—Province of Court.—In a case where the court may lawfully direct a compulsory reference, it may act upon the evidence reported by the referee, and find therefrom different conclusions of fact from those reported by the referee.

*See notes at end of case.

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APPEAL by plaintiff from Saline county circuit court.
Affirmed.

Leslie Orear and Alf F. Rector, for appellant.

Thos. Shackelford, W. M. Williams, John A. Rich, Syd. B. Burks, and *D. D. Duggins*, for respondents.

MARSHALL, J. This is an action by a depositor in the Citizens' Stock Bank of Slater against the directors thereof to recover \$8,000, lost by the failure of that bank. The petition is in two counts. The first count is predicated upon section 2760, Rev. St. 1889, which makes directors of a bank individually responsible for deposits accepted, with their assent, after they had knowledge that the bank is insolvent or in failing circumstances. The second count is an action for deceit, charging that the plaintiff was induced to make such deposit by reason of false and fraudulent representations that the bank was solvent, such representations consisting of the reports made to the secretary of state, as required by section 2752, Rev. St. 1889. All other such misrepresentations were withdrawn at the trial, and are therefore no longer in this case. The answers are general denials. On motion of the plaintiff, and over the objection of the defendants, the case was sent to a referee, "to hear and try the issues."

The referee's report, omitting formal preliminary recitals, is as follows: "That in said cause I find the issues upon the pleadings and evidence as follows: I find the issues in said cause, from the evidence, in favor of plaintiff; that is, I find the facts stated in the petition in both counts are true as therein alleged, except as herein otherwise indicated. I find especially the following facts: First, that one Joseph Field acted as cashier of the Citizens' Stock Bank of Slater, Mo., from 1882 until the assignment thereof, December 17, 1894; that during all that time he was elected at each annual election in December of each year a director of said bank, and was annually appointed cashier [here follows a finding as to the terms for which the defendants were elected directors,

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covering the periods involved in this case]; that defendant Hill was elected annually as president of said bank from the time of its organization, in September, 1882, being elected annually by the board of directors, and that he continued to act as its president until the assignment of said bank. I further find from the evidence that the statements made to the said secretary of state, and signed by said president and cashier, were attested as correct by defendants J. W. Field, R. B. Eubank and W. I. Garnett, by their signatures as directors to the one purporting to show the condition of said bank February 20, 1894, and referred to in evidence; that the statement in evidence made to said secretary of state, and purporting to show the conditions of said bank June 2, 1894, was signed and attested by defendants P. C. Storts, R. B. Eubank, and W. I. Garnett as directors; that the statements in evidence made to said secretary of state, showing the condition of said bank January 17, 1891, and May 16, 1891, were signed and attested by defendants Wm. I. Garnett, J. W. Field, and R. B. Eubank as attesting directors; that the statements to said secretary of state in evidence, showing the condition of bank January 2, 1892, and May 16, 1892, were signed by the defendants Wm. I. Garnett and J. W. Field; that the statements in evidence to said secretary of state showing the condition of said bank October 31, 1892, and April 22, 1893, were signed by defendants Garnett, Eubank, and Field as attesting directors; that the statement in evidence showing the condition of said bank September 16, 1893, made to said secretary of state, was signed by defendants Storts and R. B. Eubank; that at the time of signing said statements said defendants knew that the same would be published and were being published in the newspapers published and circulated in Slater, where said bank was situated; that the statements aforesaid represented and showed said bank to be in a good and solvent condition, whereas, in fact, I find from the evidence that said bank was insolvent at the dates mentioned in said several statements, and had been insolvent from December, 1887, until its close,

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December 15, 1894; that said several defendants, when they signed said several statements, did so without any examination of the books, notes, and securities claimed to be in the possession of said bank, and without knowing whether the statements contained therein as to the condition of said bank were true or not; that they severally signed said statements relying on said cashier's statement or representations that the same was true, and without knowing whether the same was true or not; that they signed said statements with the knowledge and expectation that the same would be published in the newspapers published and circulated among the people where the said bank was situated; that said statements were signed by said defendants without any order of the board of directors of said bank as such board; that said defendants signed said statements with full knowledge on their part that they had not examined the cash, notes, or books showing the condition of said bank, and which purported to be in the possession of said bank. I find further from the evidence that the directors of said bank only held annual meetings, and then for the election of cashier and other officers; that these meetings were just after the annual election of directors by the stockholders; that they never at any time required the cashier or any of the officers of said bank to give any bond; that the reputation of said Joseph Field while acting as cashier of said bank was that of a good business man, as well as a man of integrity and wealth, up to the time of said bank's assignment, and that defendants had knowledge of and relied on said reputation of said cashier for integrity and wealth. I further find from the evidence that during the said time said defendants were acting as directors of said bank they were frequently about the bank, and had access to the books, papers, notes, and securities belonging to said bank, and that they could, by the exercise of ordinary care and diligence, have known the true condition of said bank at the time of said several statements so made to the secretary of state as aforesaid, or could, with the means of knowledge at their command, have known that said bank was

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insolvent at the dates of said several statements so signed by them as aforesaid, by examination. That the books of said bank, which were accessible to said defendants, and could have been examined by them if desired, showed that one Mead Mercantile Company was constantly indebted from December 30, 1887, to the date of said assignment to said bank, in divers large sums of money, evidenced by notes and overdrafts, ranging from about \$4,500, November 7, 1887, up to \$77,000, December 15, 1894, with an overdraft of \$7,825.97 at last-named date. That said indebtedness, December, 1888, amounted to over \$60,000; June, 1889, to about \$44,000; December, 1890, \$45,000; December, 1891, to over \$74,000; June, 1892, over \$75,000; December, 1892, \$73,000, with overdraft for \$10,787.42 in addition; June, 1893, over \$73,000; December, 1893, 73,000, with overdrafts for \$12,474.49; June, 1894, \$64,500 in notes, with overdraft of \$14,483.29; December 15, 1894, note for \$77,000, with overdraft for \$7,825.97. That one firm, composed of W. B. Storts and J. D. Eubank, styled 'Storts & Eubank,' were constantly indebted to said bank in notes and large overdrafts from December 30, 1887, to February 13, 1892, in amounts ranging from \$52,000 at the former date in notes (and overdrafts for \$1,895.11) to \$117,294 at the latter date. That between said dates the amount of indebtedness gradually increased, until June, 1891, it amounted in notes to \$146,691, and overdrafts for \$10,778.32. That their overdraft alone amounted, June 30, 1888, to \$16,401.19, with notes at over 52,000. That their indebtedness in June, 1889, was over \$90,000; June, 1890, over \$122,000; December, 1890, over \$136,000. That said firm continued indebted to said bank, according to the books at the time of the assignment of the bank, for \$117,294. That said book showed an individual indebtedness of said W. B. Storts of over \$8,000 in June, 1891: over \$19,000, December, 1891; nearly \$25,000, June, 1892; over \$30,000, December, 1892; over \$35,000, June, 1893; over \$38,000, December, 1893; over \$54,000, June, 1894; and over \$57,000 at the clos-

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ing of said bank. That part of said indebtedness consisted in overdrafts at those dates. That the books of said bank showed on their face a constant indebtedness on the part of said cashier between December 30, 1887 (when he owed the bank \$7,000 in notes and overdrafts), and over \$19,000 at the close of the bank, on December 15, 1894. That the account of said cashier showed almost a constant overdraft, and frequently for large amounts. For instance, in December, 1890, his account showed notes due from him \$6,000, and overdrafts \$13,529.46; June, 1892, \$11,340 in notes, and over \$2,600 in overdrafts; in December, 1892, the same amount of notes, and \$9,341.84 overdrafts; June, 1893, notes due by him \$11,912, and overdraft \$11,939.83; December, 1893, over \$14,000 in notes and overdrafts; in June, 1894, \$12,100 in notes, and \$8,164.96 in overdrafts. That one firm, of B. P. Storts & Co. (said Joseph Field being a member of said firm), as shown by said books, was indebted to said bank in notes and overdrafts, in December, 1891, for over \$6,000; in June, 1892, nearly \$17,000; in December, 1892, over \$15,000; in June, 1893, nearly \$17,000; in December, 1893, nearly \$22,000 (the overdrafts being over \$7,000); in June, 1894, over \$32,000; on December 15, 1894, \$42,300 in notes, and \$4,179.70 overdrafts. That one Josiah Baker, Jr., was between December 30, 1887, and December 15, 1894, constantly indebted, as shown by the books of said bank, for large amounts of notes and overdrafts,—that is to say, over \$17,000 at the former date, and at the latter date \$77,500 in notes and \$9,790.59 in overdrafts. That said accounts showed that in June, 1889, he owed the bank over \$86,000; June, 1890, about \$50,000; June, 1891, over \$76,000; June, 1892, \$83,000 in notes, and \$13,094.39 in overdrafts; June, 1892, over \$71,000; in December, 1893, over \$56,000; in June, 1894, over \$68,000. I find that said debtors were insolvent. I further find from the evidence that defendants all had knowledge that said debtors aforesaid were indebted to said bank at various times while they were acting as directors, but the evidence

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does not disclose that defendants had knowledge of the full extent of the indebtedness of said defendants; that said defendants had knowledge that said Joseph Field was a member of the firm of B. P. Storts & Co.; that defendants had knowledge that all said debtors aforesaid were using a good deal of money out of said bank, and that said Field, as cashier, was cautioned by them not to let any one man or party have too much money. I further find from the evidence that said directors, while acting as directors, committed to said cashier almost exclusively, if not entirely so, the matter of loaning money, and gave little or no personal attention on their part to the same; that, while they thus committed the management of loans and the taking of security to said cashier almost exclusively, they were about the bank frequently, making inquiry about the bank and its condition, and accepted assurances from said cashier that the same was always prospering; that, by a by-law adopted by the stockholders of said bank in 1882, it was provided that the cashier 'shall have full power and authority to create indebtedness against the bank, to sign all issues of indebtedness and make indorsements for the bank, and receive and receipt for and pay out money for the bank'; that defendants Garnett, Storts, and Hill were present at the adoption of said by-laws; that defendants knew during the time they were acting as directors that said bank was from time to time borrowing money from other banks, but it does not appear from the evidence that they had actual knowledge of the extent of the indebtedness of said Citizens' Stock Bank to other banks while acting as directors. I further find from the evidence that said cashier, Joseph Field, was a brother of defendant J. W. Field, and that Wm. Storts and B. P. Storts, debtors of said bank aforesaid, were and are sons of defendant Storts; that Jerome D. Eubank, a member of said firm of Storts & Eubank, was and is a son of defendant R. B. Eubank. I furthermore find from the evidence that defendants, at no time while acting as directors, counted the cash or

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examined the securities and footed the same up, so as to know the amount of assets or examined the securities given, if any, to secure money loaned, and that they did not require such securities to be exhibited to them for their sanction, nor did they give special directions to said cashier not to loan to the various debtors aforesaid shown to be so largely indebted to said bank. I further find from the facts and circumstances in evidence that defendants had their suspicions aroused by the character and kind of business of some of said debtors of said bank to such an extent that they were thereby put upon inquiry, and had they performed their duty, and examined properly into the facts, they could have discovered, by reason of such examination, the insolvency of said bank. I further find that said official statements, signed and attested by defendants, made to the secretary of state as aforesaid, were materially different from the general balance book kept by the cashier of said bank while defendants were directors; that, by comparison of said official statements with said balance book, it will be seen that the assets and resources are often greatly inflated, often to the extent of many thousand dollars, while the liabilities often appear diminished by many thousands of dollars in the published statements as compared with the amounts shown by the books. Particularly is this shown to be true with reference to the items of 'Loans and Discounts, Undoubtedly Good, on Personal and Real-Estate Security,' 'Due from Other Banks, Good on Sight Draft,' 'Cash and National Bank Notes,' 'Surplus Funds on Hand,' 'Deposits Subject to Draft at Sight by Banks,' 'Deposits Subject to Draft at Sight by Individuals,' 'Deposits Subject to Draft at Given Dates.' These discrepancies occur all along from 1887 until the close of the bank, and range in amounts from \$25,000 to \$50,000, and often more. Said published statements were materially false, and did not state or show the true condition of the bank at the dates mentioned therein, and particularly were false as to the items of the amount of loans and discounts, and undoubtedly good, on personal or collateral security, and

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loans secured on real-estate security. I find further that, if defendants did in fact examine the balance books kept by the bank, and compare the same with the statements in evidence signed and attested to be correct, they must necessarily have known such statements were false, but I conclude they did not make such comparisons or examinations. I furthermore find that had said directors, at any of the dates when they made their said statements to the secretary of state and for publication, examined the books kept by said bank, they could have ascertained the indebtedness in favor of the bank, and the character of the notes, and insufficiency of the securities therefor, to such an extent that they would thereby have discovered the insolvency of said bank. I think, as a matter of law, that when said defendants signed said statements to the secretary of state they should be held to have meant to do so as of their own personal knowledge; that the public had a right to rely on the correctness of such statements so published; that plaintiff and the public had a right to rely on the published statements as being true, and that on the faith of such statements plaintiff did rely and deposit his money as stated in petition; that it was the duty of defendants, as managing officers of said bank, to know its condition, to acquaint themselves with the assets, cash, and notes, and the nature of the security therefor; that they had no right to abdicate their function, and rely entirely upon the cashier employed by them, however good his reputation, to do their work; that if they could thus shield themselves from their duty of examining the books, and acquainting themselves with the loans made from time to time, and the securities taken therefor, there would be no necessity for the appointment of directors, under our statutes; that the law requiring three directors to attest as correct the sworn statement of the cashier and president contemplates that said directors should not be mere figureheads, but that they should sign such statements with personal knowledge of what they were doing, otherwise the publication of such statement at the place

where the bank is kept would be without significance; that these statements must have been intended to advise the public with reference to the financial condition of the bank, so the public could act advisedly as to making deposits; that defendants, as directors, having special means of knowledge, would be presumed by the public, from the nature of their positions, having access to the books, notes, securities, and cash of the bank (while the public has not), to have correct knowledge, and to make no statements that would be false or misleading; that having assumed to know, as of their own personal knowledge, the actual financial condition of the bank, and signed statements purporting to show a healthy, sound condition of the same, they must be held to have intended their statements to be believed, and, if in fact materially false, they will be bound for such false statements, and cannot shield themselves under the plea that they were ignorant of the true condition of the bank when they signed such statement; that, in order to hold the defendants liable, it is not necessary that they corruptly or intentionally signed statements knowing at the time they were false, and with the intention and purpose of deceiving the public thereby. In this case I do not find from the evidence that defendants continued on the business of the bank for the purpose of enabling them to reimburse themselves on account of having signed and indorsed obligations of said bank which did not appear in said statements and representations so made as charged in petition, nor that said business was continued for the purpose of enabling defendants to prefer themselves on account of deposits made in said bank by them as charged in said petition; that otherwise the facts so charged in the first and second counts of the petition, as hereinbefore modified, are found for plaintiff. The third count in said petition was dismissed by plaintiff. As a result of my conclusion as to the facts, and the law applicable thereto, I find that the defendants are indebted to plaintiff in the sum of \$7,760, being amount deposited by plaintiff, less a credit of 3 per cent. paid by assignee of said Citizens' Stock Bank; that

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said amount so found shall bear interest from the filing of this suit, January 25, 1895, at 6 per cent." And the referee also filed with his report all of the evidence taken on the hearing of said cause.

In due time the defendants filed exceptions (32 in number) to the report. The court sustained the 1st, 3d, 4th, 15th, 17th, 18th, 19th, 20th, 21st, 22d, 25th, and 26th, and overruled the others. Those sustained are as follows: "We except to the report of the referee: (1) Because said referee predicates his findings on the ground that the defendants had, in the management of the affairs of the Citizens' Stock Bank, as directors of said bank, been guilty of negligence which was not an issue in this case, and had been settled by a judgment of this court in another case." "(3) Because the conclusion of law of said referee, as stated in his report, that the plaintiff is entitled to recover upon the first count of the petition, is not supported by the findings of fact made by said referee in said report, in this: that said referee does not find as a matter of fact that the defendants, or either of them, did receive or assent to the reception by the Citizens' Stock Bank of Slater of the deposits by plaintiff, or did create or assent to the creation of the debt due by such bank to the plaintiff after they, or either of them, had knowledge of the fact that said bank was insolvent or in failing circumstances, but, upon the contrary thereof, found, as a matter of fact, that said directors did not have such knowledge, but simply were put upon inquiry, or, by the exercise of reasonable diligence, might have obtained knowledge, of the insolvency of the bank, before plaintiff's deposits were made in said bank, or the indebtedness to him was created; and, as a matter of law upon this finding of fact, the plaintiff is not entitled to recover upon the first count of the petition, as the referee erroneously reports. (4) Because the referee erroneously finds as a matter of fact that the defendants were guilty of negligence in the discharge of their duties as directors of said bank, and concludes as a matter of law that by reason of such negligence the plaintiff is entitled to recover upon the

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first count of the petition upon the statutory cause given by section 2760 of the Revised Statutes of this state, and also is entitled to recover upon the second count for fraudulent representations, whereas, as a matter of law, such negligence is not sufficient to authorize a recovery upon either count of the petition herein." "(15) Because the referee finds that the defendants, as directors of the Citizens' Stock Bank, had their suspicions aroused by the character and kinds of business of some of the debtors of said bank to such an extent that they were put upon inquiry, and by properly discharging their duties could have discovered the insolvency of the bank, which finding is against the evidence and against the weight of evidence." "(17) Because the referee failed to find specifically each fact made an issue by the pleadings, and did not find whether or not the defendants, or either of them, received or assented to the reception of a deposit or deposits in the Citizens' Stock Bank by the plaintiff, or created or assented to the creation of a debt by the Citizens' Stock Bank to the plaintiff, when they knew the bank to be insolvent. (18) Because the referee finds that the statements furnished by the Citizens' Stock Bank to the secretary of state were intended by the defendants to induce the plaintiff to deposit his money in said bank or permit said bank to become indebted to him, which finding is against the evidence and against the weight of evidence. (19) Because the referee finds that the defendants were guilty of negligence in the performance of their duties as directors of the Citizens' Stock Bank, and bases his conclusions of law that the plaintiff is entitled to recover upon such findings, when in truth no such issue is raised by the petition in this cause, nor were any such issues referred to said referee, and the finding upon that point is not within the issues made by the pleadings in this cause. (20) Because the referee erroneously reports as a matter of law that the defendants must be held to have intended the statements filed with the secretary of state by the Citizens' Stock Bank, and thereafter published in the local papers at Slater, attested by them as

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directors of said bank, to have been made as of their own personal knowledge, whereas, as a matter of law, the plaintiff had no right to rely upon said statements as having been made by defendants as of their own personal knowledge, or as their personal statements and representations. (21) Because said referee erroneously reports and finds as a conclusion of law that the reports of the financial condition of said bank made to the secretary of state, and published in the papers at Slater, were intended by defendants to induce the plaintiff and the public to give credit to said bank, and that said statements were the individual statements of the directors, and not the statements of the corporation, and therein said referee erred as a matter of law. (22) Because the uncontradicted facts introduced before the referee, and included in the testimony returned by him with his report, showed that the defendants, in signing and attesting the statements of the financial condition of said bank to be filed with the secretary of state, in good faith wholly believing said statements to be true, and believing that they had sufficient knowledge of the affairs of said bank for the said statements, and yet said referee wholly fails to find and report distinctly and in express terms his conclusion of fact that said defendants did believe said statements to be true, and did make the same in good faith, only relying upon the reports made to them by the officers in charge of the books of said bank, when the evidence before said referee fully established said fact, and the same should have been found as a matter of fact by said referee, and not stated in his report inferentially, as said referee does state the same.” “(25) Because the referee erroneously reports and holds as a matter of law that when the defendants, as directors of the Citizens’ Stock Bank, signed and attested reports of its financial condition, that it was their duty to know the condition of the bank, and that they had no right to rely upon the statements of the cashier and officers in charge of the books as to their contents, but were themselves bound to know what said books contained, and that they must have

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personal knowledge of the exact financial condition of the bank, and, in effect, that they were warrantors of the truthfulness of the statements aforesaid, and are liable for fraudulent misrepresentations if said statements were not absolutely correct, although believed by them to be true, and signed in reliance upon statements furnished by officers in charge of the bank of good repute, and without any facts known to defendants to excite their suspicions that such representations were false, whereas the defendants could not be held liable in an action of deceit upon any such finding of facts, and the referee erroneously reports to the contrary. (26) Because the referee's conclusions of law as to the second count of the petition are not supported by his findings of facts applicable to said count, in this: that the facts found by said referee as to the statements of the financial condition of said bank showed that said statements were attested by defendants and signed by them as directors of said bank, and that said statements appear to be the actual statements of the corporation, and were attested by defendants under the honest belief that they were true, and in reliance upon statements made to them by officers in charge of the books of the bank, and that the defendants could not be held to have made said statements falsely and fraudulently, upon the facts found by said referee, nor can they be held liable upon such facts in an action of deceit for the statements therein referred to,"—which said exceptions were afterwards taken up by the court for hearing, to wit, on the —— day of August, 1897, at the said June term of the said circuit court, and, after hearing the argument of counsel, the said exceptions were taken under advisement by the court until the October term, 1897, of said Saline county circuit court.

Afterwards, to wit, on the first day of the said October term, 1897, to wit, on the 4th day of October, 1897, the plaintiff asked the court to give the following declarations of law: "The court declares the law as follows: (1) That if the evidence shows that the defendants were directors of the Citizens' Stock Bank, and that the same was a banking

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institution, organized and doing business under the provisions of chapter 42, art. 7, Rev. St. Mo., at the time stated in the plaintiff's petition and that the said defendants, as such directors, kept said bank open for the reception of deposits therein, and while so keeping said bank open for that purpose the plaintiff deposited therein the sum of money alleged in the petition, and that the said defendants assented to the reception of said deposit after they had knowledge of the fact that the said bank was in an insolvent condition or in failing circumstances, then the finding must be for the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said banking institution and remains unpaid. (2) The court further declares the law to be that if the defendant directors knew that the Citizens' Stock Bank was open for the transaction of business and the reception of deposits at the time that the plaintiff deposited his money in said bank, as stated in the petition, then the said defendants must be found as assenting to the reception of said deposits by said bank, unless the defendant directors objected thereto. (3) The court further declares the law to be that it was the duty of the defendant directors, under their office, to manage and control the affairs of the Citizens' Stock Bank, and it was their duty to know the condition of said bank, and, if the evidence shows that the plaintiff deposited his money in said bank while the same was in an insolvent condition or in failing circumstances, the law presumes that the said deposit was made with the assent of the defendants as directors, and that they had knowledge of such insolvency at the time; and, unless the defendants rebut said presumption by evidence, such presumption becomes conclusive, and the burden of proof is placed upon the defendants to show want of such knowledge or assent; and where such legal presumption is sought to be overcome by evidence, as in this case, the presumption of knowledge of said bank's insolvency is sought to be denied by the tes-

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timony of the defendants, the said knowledge must be found as a fact; but such knowledge need not be proven by direct evidence, but may be proven by facts and circumstances. And if the evidence shows that the defendants had opportunities for knowing the true condition of said bank, and were frequently at its banking house, and made inquiries of its officers as to its condition, and examined its assets and books, and had knowledge of such facts and circumstances which, if followed up by a reasonably prudent person, would have disclosed the true condition of said bank, then such knowledge may be inferred from such facts and circumstances and such opportunities for knowing the condition of said bank. (4) The court further declares the law to be that if the evidence shows that the plaintiff, at the time stated in the second count of the petition, deposited any sum of money in the Citizens' Stock Bank, and prior to making said deposit the defendants represented the said bank to be in a solvent condition, by making and publishing written statements showing said bank to be in a solvent condition, which said statements were seen and relied upon by the plaintiff before making said deposits, and that at the time said statements were so made and published by the defendants that the said bank was in an insolvent condition, and that said statements were false, and that the defendants knew at the time that said statements were false, or that the defendants were conscious of the fact that they did not know whether the said statements were true or false, and published the same knowing that they had no knowledge as to whether said statements were true or false, and such statements were made for the purpose of inducing the plaintiff or other persons who might see them to believe that said bank was in a solvent condition, then the finding must be for the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said bank and such sum as may remain unpaid. (5) The court further declares the law to be that the statements required by law to be made to the secretary of state by the defendant

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directors should be a true statement of the condition of the Citizens' Stock Bank, of which they were directors, at the time stated in said statements so made and signed by them, and that the said statements are for the information of the public when the same are published as required by law, and that the plaintiff and the public had a right to rely upon such published statements as being true, and that said statements read in evidence purported to be the corporate act of the board of directors of the Citizens' Stock Bank, and purported to be within the personal knowledge of such of the defendants as signed the same; and if the evidence shows that the said statements were false, and did not contain a true statement as to the condition of said bank, and the defendant directors knew at the time said statements were published that the same had not been authorized by the board of directors of said bank, and knew that the same was the individual act of said directors so signing and publishing said statements, and they knew that said statements were designed for publication, and were intended for the public, and that said statements were seen and relied upon by the plaintiff before making his said deposit, and that the defendants knew that they had no personal knowledge as to whether said statements were true or false, and that said statements were materially false, and that said bank was then in an insolvent condition instead of a sound condition, then said statements were made and published scienter, and the plaintiff is entitled to recover such damages as the evidence may show that he has sustained in consequence thereof,"—which declarations of law the court refused to give, to which action of the court in refusing to give each of said declarations of law the plaintiff then and there excepted.

The court thereupon rendered a judgment upon the referee's report for the defendants, in words and figures as follows: "Now, at this day come again the parties, by their respective attorneys, and the exceptions heretofore filed by defendants to the report of Hon. Charles W. Sloan,

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referee, and this cause having been argued and submitted at the last term, and taken under advisement, and the court, being now fully advised of and concerning the premises, doth find from the report that the referee did determine as a fact and report that defendants did not have knowledge of the insolvency of the Citizens' Stock Bank, or of its failing condition or circumstances, at the times of the making of the deposit and the creation of the debts sued for in plaintiff's petition; and the court doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizens' Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank set out and referred to in the petition were true, and that said statements and representations were made by defendants in good faith, and in reliance upon the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books; and the court, being satisfied that said finding of fact, as above set out, was proper and correct, upon the evidence reported by the referee, doth now sustain exceptions numbered 1, 3, 4, 15, 17, 18, 19, 20, 21, 22, 25, and 26 filed by the defendants to the report of the referee, and doth now overrule all other exceptions filed by defendants to said report; and the court doth hold and determine as a matter of law, upon the facts reported by said referee, that the plaintiff is not entitled to recover upon either count of the petition, and doth therefore find the issues for the defendants upon all the counts of the petition. Wherefore it is considered by the court that the plaintiff take nothing by his said writ, and that defendants go hence without day, and that they have and recover of plaintiff their costs and charges in this behalf laid out and expended, and that execution issue therefor."

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In proper time the plaintiff filed a motion for a new trial, which being overruled, he filed a bill of exceptions. In the abstract of the record it is stated that the evidence taken before the referee tended to support his findings of fact. The bill of exceptions did not reserve any of the evidence in the case, notwithstanding the defendants insisted upon it being embodied in full therein. So that this case is now before this court on the pleadings, the report of the referee, the exceptions thereto, the instructions asked by the plaintiff, and the judgment of the court on the referee's report.

Of the exceptions sustained, the fifteenth and eighteenth are based upon the weight of the evidence, and the ruling of the trial court as to them will not be reviewed in this court—First, because it is the settled practice of this ^{Appeal—Review.} court not to review conflicting evidence, nor to review the rulings or findings of the trial court on such evidence; and, second, because, even if this were not so, there is no evidence before us in this case. The ruling of the trial court must therefore be taken to hold, in this regard, that the suspicions of the defendants were not aroused by the character and kinds of the business of some of the debtors of the bank to such an extent that they were put upon inquiry, and by the proper discharge of their duties they could have discovered the insolvency of the bank, and that the statements made by the defendants to the secretary of state were not intended to induce the plaintiff to deposit his money in the bank.

This leaves two questions of law in this case, to wit: First, in an action, under section 2760, Rev. St. 1889, by a depositor against the directors of a bank, who assent to the reception of deposits after they have knowledge that the bank is insolvent or in failing circumstances, or such directors individually responsible for such deposits, unless it appears, from the whole case, that they had actual knowledge, or are they liable if it appears that they were negligently ignorant of the condition of the bank, in that they could have ascertained

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its condition if they had not neglected to investigate or keep posted as to the affairs of the bank, and are they so charged by law with the duty of managing the business of the bank that they are charged with knowledge, and are estopped to plead ignorance of its condition? and, second, are directors of a bank liable to depositors, in a common-law action for deceit, for statements made to the secretary of state, required by section 2752. *Id.*, which were not true, but which they honestly believed were true, and which were in good faith based upon details furnished to them by the cashier of the bank, whose reputation was good? These questions will be treated in their order.

1. The first proposition necessitates a short retrospect of the law. The relation of a depositor to a bank is that of ordinary debtor and creditor. "The relation between the creditors and the corporation 'is that of contract, and not of

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ing Deposits
after Insol-
vency—Liability
of Directors.

trust.' " Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, followed in Bank v. Hill, 148 Mo., loc. cit. 396, 49 S. W.

1012. "But there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors." *Id.* Accordingly, it was held in Bank v. Hill, *supra* (which was a suit by the creditors of this same bank against these same defendants to recover the deposits lost by the creditors by reason of the negligence of the defendants in managing the affairs of the bank), that there could be no recovery by depositors against directors of a bank because of the negligence of the directors in managing the affairs of the bank; that the directors are liable for negligent performance of duty to the bank, or to its assignee, or to a receiver thereof, but not to the creditors, because of want of privity of contract or duty between them. So, also, in Fusz v. Spaunhorst, 67 Mo., loc. cit. 264, 265, the same doctrine was announced by this court, speaking through SHERWOOD, J., and it was further pointed out that, aside from statutory liability, directors were not liable individually to depositors for mere nonfeasance; that "nothing

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short of active participation in a positively wrongful act, intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability"; that the injury must be "occasioned by the malicious or fraudulent act of the party complained of." The case last referred to was an action by depositors against directors of a bank, and was based upon section 27, art. 12, Const. Mo. 1875, which is as follows: "Sec. 27. It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." It was held that this section of the constitution was not self-enforcing, and that, as no statute had been passed carrying it into effect, there was no statutory liability of directors of a bank to its depositors, and as there was no such liability, except upon the grounds pointed out, at common law the defendants were not liable at all. By the act of May 15, 1877, the general assembly amended the law as to banks. Acts 1877, p. 28. Section 21 of that act was as follows: "No president, director, manager, cashier, or other officer or agent of any bank organized and doing business under the provisions of this act, or any law of this state, shall receive or consent to the reception of deposits, or create or consent to the creation of any indebtedness after becoming aware that such association is insolvent, or in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received and all such debts so contracted," etc. Then follow provisions allowing contribution to be recovered by one director from another, which is omitted, because not material here. At the same session the general assembly, by an act approved

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April 18, 1877 (Acts 1877, p. 239), amended Gen. St. c. 201, relating to crimes, by adding a new section thereto, as follows: "If any president, director, manager, cashier or other officer of any banking institution, doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, or if any such officer or agent, shall create or assent to the creation of any debts or indebtedness by such bank or banking institution, in consideration, or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof, shall be punished in the manner and to the same extent as is provided by law for stealing the same amount of money deposited or valuable thing, if loss occur by reason of such deposit." The act of May 15, 1877, relating to civil liability, was amended by changing the words, "after becoming aware," to the words, "after he shall have had knowledge of the fact," and was carried into the Revision of 1879, with an amendment as to contributions not material here, and became section 918, art. 7, c. 21. The act of April 23, 1877 (Acts 1877, pp. 35, 36), now section 2761, Rev. St. 1889, makes the insolvency or failing circumstances of the bank *prima facie* evidence of the knowledge and assent of the directors. The act of April 18, 1877, relating to criminal liability, was carried into the Revision of 1879, and became section 1350, art. 3, c. 24, but it was amended by that revision by adding thereto the following proviso: "Provided, that the failure of any such bank or banking institution shall be *prima facie* evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit." The act of 1887 (Acts 1887, p. 162) extended the criminal law so as to apply to private banks. The provision as to civil liability was carried into the Revised Statutes of 1889 without any change

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whatever. The provision as to criminal liability (being section 1350, Rev. St. 1879, as amended by the act of 1887) was carried into the Revision of 1889 without change, and appears as section 3581 thereof.

Thus we see that, so far as civil liability is concerned, the only change material to this inquiry that has been made in the law since the two acts of 1877 were passed was to strike out the words, "after becoming aware," and to substitute the words, "after he shall have had knowledge of the fact" that the bank is insolvent or in failing circumstances; thereby using the same words that are employed in the constitution and in the criminal statute. It will be noted, however, that the criminal statute has been changed so as to make the failure of the bank *prima facie* evidence of knowledge on the part of any officer that the bank was insolvent or in failing circumstances when the deposit was received. *State v. Darragh* (Mo. Sup.) 54 S. W. 226, was a criminal prosecution, under section 3581, against the president of a bank for receiving deposits after he had knowledge that the bank was insolvent or in failing circumstances, and it was held error to refuse an instruction which declared the law to be that, notwithstanding the failure of the bank was *prima facie* evidence of such knowledge, still the burden of proof was not changed by the statute, but that the defendant could show the condition of the bank and circumstances tending to exonerate him from criminal liability, and then, on the whole case, the burden of proof would still rest on the state; and the same is true as to proceedings under the civil statute.

This decision disposes of the plaintiff's claim that the defendants are estopped from showing want of knowledge because it is their duty under the law to know. If anything further were needed to be said as to this contention, it would be sufficient to add that the statute only makes the failure of the bank *prima facie* knowledge of insolvency, whereas, if the defendants are estopped to deny knowledge because it was their duty to know, or because if they had not been negligent they would

Same—Same—
Same—Estoppel.

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not have been ignorant, then the failure of the bank would necessarily be conclusive knowledge of insolvency, and, if this were true, there would be no defense to a suit of this character or to a criminal prosecution. It would be enough to prove the deposit and the failure of the bank, and the court would have to instruct the jury to return a verdict for the plaintiff. This would make directors and officers of a bank guarantors to the depositors of all money deposited in the bank. The history of the law, its language, and the prior decisions of this court demonstrate that neither the framers of the constitution nor the lawmakers ever intended to provide for any such revolution in the liability of directors of a bank. The law is drastic and penal, but it does not cut off all defense. It was intended to reach and punish the guilty, not to ruin and disgrace the honest, directors, who acted in perfect good faith and without guilty knowledge. Such a construction as is here contended for would shut the doors of every bank in the state, because honest and responsible directors would not serve as such officers, and thereby incur liabilities and penalties far beyond what the law imposes on them in similar relations to all other corporations, or else a far worse condition than closing the banks would be brought about; for irresponsible and conscienceless persons could alone be induced to accept directorships or offices in banks, intended to "make hay while the sun shone," and when the crash came take a change of venue to some other jurisdiction, where the extradition laws do not apply.

The liability of directors under the criminal law must be regarded as settled by the Darragh Case. The civil and criminal statutes, though passed as separate acts, were passed at the same session of the general assembly, and were both enacted to carry into effect the provisions of section 27, art. 12, of the constitution, which provides for a criminal and civil liability both, and therefore these acts may be and should be read together, and a judicial construction of one applies with equal force to similar provisions of the other. The constitution and both acts require that, to subject a

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director or officer to the pain and penalties denounced, "he shall have had knowledge of the fact that it is insolvent, or in failing circumstances," when he assented to the receipt of the deposit. The word "knowledge" here employed must be taken in its common acceptation; that is, in the plain or ordinary meaning and usual sense of the word. *State v. Jones*, 102 Mo. 305, 14 S. W. 946, 15 S. W. 556; *Warren v. Paving Co.*, 115 Mo. 572, 22 S. W. 490; *State v. Marion Co. Ct.*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23. It ought to be so construed that no man who is innocent can be punished or endangered. *State v. McLain*, 49 Mo. App. 398; 4 Bac. Abr. "Statutes." So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webst. Dict. defines "knowledge": "(1) The certain preception of truth; belief which amounts to, or results in, moral certainty; indubitable apprehension." "(5) information; intelligence; as, 'to have knowledge of a fact.'" The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent, *bona fide*, ignorance arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge. The framers of the organic and of the statute law must be held to have understood how the business of a bank is conducted. They must have known that the directors are drawn from the busiest men in the community; men who have carved success out of chaos, who have succeeded where the great multitude has failed; men who are not expected, and could not afford, to give their whole time to the business of the bank. The lawmakers knew that the active management of a bank usually devolves upon the president and cashier, and that to the latter is usually intrusted the management of the details. They knew that few directors had the time, and fewer still the capacity, to

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examine the books of a bank, and ascertain its solvency; that even in their own business they could not take off a trial balance from the books they employed experts to keep for them, either because they had not time to do so for themselves, or because they did not have the capacity to do so. The law imposes a liability on directors of a bank which directors of no other corporation are subject to. It is a liability which is not limited to any specific amount; it is as broad as the wrongdoing—the fraud—of the director. It is a personal liability for every cent a depositor lost which a director consented to have deposited in the bank after the director shall have had knowledge of the insolvency of the bank or that it was in failing circumstances. It is an unlimited liability, but it is not an absolute one. It is qualified by a condition the existence or nonexistence of which may make the director liable for the total amount lost by the depositor, or may not make him liable for a cent thereof. The liability is measured by the knowledge. As was said in *Fusz v. Spaunhorst*, *supra*, the directors are not liable to the depositors, “unless the injury were occasioned by the malicious or fraudulent act of the party complained of; mere nonfeasance will not answer.” So it is that the plaintiff in a suit of this character must allege a fraud committed by the defendant,—a willful act done,—in order to hold the defendant liable, and, having alleged a fraud, the burden rests on the plaintiff to prove it. And as was aptly stated by BLACK, J., in *Van Raalte v. Harrington*, 110 Mo. 611, 14 S. W. 710, 11 L. R. A. 424: “It is one thing to say knowledge may be inferred from facts and circumstances sufficient to put a person upon inquiry, but it is a different thing to say such circumstances are, as a matter of law, knowledge.” In this case there is no pretense that the defendants had actual knowledge, and the judgment of the trial court finds the fact to be, not only that they had no knowledge, but also that their suspicions were not even aroused to such an extent as would have put a prudent man on inquiry. The judgment of the circuit court in this regard is this: “And the court

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doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizens' Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank, set out and referred to in the petition, were true, and that said statements and representations were made by defendants in good faith, and in reliance upon the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books, and the court being satisfied that said findings of fact, as above set out, was proper and correct upon the evidence reported by the referee," etc. In the case of *Bank v. Hill, supra*, this court held that they were not liable in a suit by creditors for negligence in the management of the affairs of the bank. But one conclusion can be drawn from these conditions, and that is that the judgment of the circuit court on the first count of the petition is right.

This conclusion is in harmony with adjudications upon analogous statutes in other jurisdictions. *State v. Tomblin*, 48 Pac. 144, was a criminal prosecution, under the statute of Kansas, against the defendant, charging that as president, director, and managing officer of a bank he "received deposits of money when the bank was insolvent, knowing that it was in that condition." The supreme court of Kansas said: "While the instructions fairly state the law in the main, the concluding paragraph of the fourteenth instruction given seems to imply that the defendant might be held guilty in a criminal prosecution if, through his negligence, he did not know the actual condition of the bank when it was in fact insolvent. It was proper for the jury to take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it, for the purpose of determining whether he actually knew its insolvent condition, but mere negligence would not render him guilty of a crime.

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It was incumbent upon the state to establish, not only the fact of insolvency, but the defendant's knowledge of it." *Minton v. Stahlman* (Tenn. Sup.) 34 S. W. 222, was an action by a depositor against the officers and directors of a bank to recover a deposit received when the bank was alleged to be insolvent, and lost by the subsequent failure of the bank. The declaration alleged that defendants were officers of the bank, "and having due notice and knowledge of such facts and circumstances as by ordinary diligence and business skill would have shown them its true financial condition, which was that of insolvency, and having reason and cause to know that any one depositing money and evidences of debt therein for collection was liable to lose the money so deposited or collected by reason of its insolvency, * * * did continue to keep open and operate the same as a bank, and invite the custom and patronage of plaintiff and others, and that plaintiff being induced thereby, and deceived and misled by such wrongful act of defendants," deposited his money, and lost it. The defendants demurred to this charge, on the ground that "they are not liable, as directors of the Bank of Commerce, for receiving deposits when they merely had notice or knowledge of facts and circumstances which, by use of ordinary diligence and business skill, would have shown the said Bank of Commerce to be insolvent. In order to be liable, it must appear that they knew the said bank to be insolvent, and willfully and knowingly received the deposits." The statute of Tennessee provides: "And if any director or directors of any of the banks of this state shall be guilty of any fraud or willful mismanagement of the affairs of such bank by which any loss shall be occasioned to its creditors such director or directors, upon legal ascertainment of the facts, shall be individually liable for such loss." The supreme court quoted and followed the decision of this court in *Fusz v. Spaunhorst*, *supra*, and held: "It was held by this court, in *Hume v. Bank*, 9 Lea 728, that 'this section provides for a case of intentional fraud and willful mismanagement.' It is not tantamount to a charge

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of intentional fraud and willful mismanagement to allege that 'having due notice and knowledge of such facts and circumstances as, by ordinary diligence and business skill, would have shown them its true financial condition, which was that of insolvency.' This, at most, is a charge of negligence and inattention; whereas, there is no liability to creditors or depositors, under this statute, without fraud or willful mismanagement." *Deadrick v. Bank* (Tenn. Sup.) 45 S. W. 786, was a bill by depositors against directors of a bank for the loss of their deposits by the failure of the bank, which is alleged to have occurred by the fraud, gross neglect, and willful mismanagement of the directors "in permitting and sanctioning certain loans to insolvent parties, without proper security, whereby the bank was wrecked." The action was based on the statute of Tennessee, above set out. The facts in that case and in the case at bar bear so striking a similitude that it is worthy of more than a passing reference. There a son of one of the directors was the cashier. The case was referred to a referee, who reported in favor of the plaintiffs, and held the directors liable, and the chancellor entered a decree accordingly. The court of chancery appeals reversed that finding, and discharged the defendants. The case was appealed to the supreme court, where, referring to the decision of the appellate court, it was said: "Continuing, that court says: 'It is manifest, from the evidence, that in the first year of this bank's existence its directory paid but little attention to its affairs. The Duncans seem to have dominated. W. M. Duncan was believed to be, and from the record was, then, a man of large means, and he was allowed free access in obtaining loans from the funds of the bank to carry on his own speculations and enterprises. While this is true, it is equally true that the other directors in the bank believed with great confidence that he approached the condition financially of a semi-millionaire, and that he was good for all his engagements. It appears, however, that in the larger and higher banking circles of the city, in 1891, his credit began to wane, but with his own bank

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people it was unquestioned until several months of 1892 had passed.' Concluding on this point, the court of chancery appeals say: 'We find much evidence in the record that the loans specifically reported by the special commissioner, and made the basis of the chancellor's decree, were imprudent, and made without that care, caution, and prudence which is ordinarily supposed to govern the action of the prudent business man.' But, while this is so, they again say: 'We have been unable to discover any proof which, with its fair and legitimate inferences, leads to the belief that appellants are chargeable, as directors, with fraud, or any willful mismanagement of their directory trust, in connection with the renewal or continuance of the loans.' Upon this finding by the court of chancery appeals it is clear that, in so far as complainants rest their right to recover upon the statutory liability of these directors to them as creditors of this bank, their bill must fall." *Patterson v. Manufacturing Co.* (Minn.) 42 N. W. 926, 4 L. R. A. 745, was a suit by a creditor against a director of a manufacturing company based upon a violation of the statute of Minnesota, which provided: "If any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid." The officers, by authority of the directors, loaned its credit by making and indorsing accommodation paper, in consequence of which the company failed, and this was the violation of the statute upon which the plaintiff predicated a right to recover. The supreme court (42 N. W. 929, 4 L. R. A., loc. cit. 751) said: "Plaintiff's contention is that it is the duty of a director to know what is being done in corporate matters; that it is negligence for him not to know; and therefore he is conclusively presumed to have known, and, not objecting, he must be deemed assenting. Such a construction would impose this severe statutory liability for at least every act of negligence for which he would be liable at

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common law; but, as the act is highly penal, we do not think it ought to receive so broad a construction. The language of the various sections all tends to indicate that the legislature intended that something more than mere negligence should be necessary to subject a person to those heavy penalties,—something amounting to willful, or, at least, intentional, violation of legal duty, either ordering the act done, participating in doing it, or assenting to its being done with knowledge that it was being or about to be done.” Other cases might be added, but the principles would not be more clearly enunciated by a multiplication of precedents. Of course, it must not be understood that it is intended to be held that a director can shut his eyes to facts, circumstances, and conditions, and then say he did not know what he must have seen if he had used his senses; for such conduct would be fraudulent and willful disregard of duty. No such condition is presented by this record. The defendants were negligent, but they acted in good faith, were innocent of wrongdoing, and hence are not to be charged as if they had acted with knowledge, and therefore were guilty of fraud. They were guilty of nonfeasance, but not of misfeasance; of negligent omission of duty, but not of fraudulent commission of wrong. It follows that the first proposition must be decided in favor of the defendants, and that the judgment of the circuit court that a case against them, under section 2760, Rev. St. 1889, had not been made out by the proof, is right.

2. The second proposition is, are directors of a bank liable to depositors, in a common-law action for deceit, for statements made to the secretary of state, required by section 2752, Rev. St. 1889, which were not true, but which they honestly believed were true, and which were, in good faith, based upon details furnished to them by the cashier of the bank, whose reputation was good? The decision of this court

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Bank's Condition
—Deceit—Li-
ability of Direct-
ors.

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in *Fusz v. Spaunhorst*, 67 Mo., loc. cit. 264, that, "aside from statutory provisions or one of similar nature in the organic law, the directors or officers of an incorporated bank would not be individually responsible, in an action at law, for injury resulting to a creditor or depositor, unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer. Nothing short of active participancy in a positively wrongful act, intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability as above indicated,"—must be taken as the major premise of the syllogism by which this proposition is solvable. And the duty of directors of a bank, under the law, in making statements to the secretary of state, is the minor premise. Section 10 of the act of 1877 (Acts 1877, p. 30, now section 2751, Rev. St. 1889) made it the duty of every banking corporation to furnish to the secretary of state, when required by him, a statement verified by the president and cashier, and attested by three directors, "of the actual condition of such corporation at the close of business on the day designated, and which day shall be prior to such call." Section 10 of the act (now section 2752) also prescribed the form of the statement. Section 11 of the act (now section 2753) required the statement to be published in one or more daily newspapers published in the city or county where the bank was located, or in such a weekly paper, if there was no such daily, and a copy to be posted in the banking house accessible to all. Section 12 of the act (now section 2754) made it the duty of the secretary of state to call for such a statement not less than twice each year, and provided that "the secretary shall give no notice to any person whomsoever of the day on which he will call for such statement." For a violation of his duty the secretary of state was subject to removal from office and a fine of not less than \$500. The act then provided: "And should any president or secretary of any such corporation, or any director thereof, refuse to make the statement so required of them, or shall

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willfully and corruptly make a false statement, they, and each of them, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon information or indictment, shall be punished by a fine for each offense, not exceeding five hundred and not less than one hundred dollars, or by imprisonment not less than one nor more than twelve months in the city or county jail, or by both such fine and imprisonment." The statute which created the duty of making these statements to the secretary of state, therefore, denounced the penalty for refusing to perform the duty, and also prescribed the punishment, if the statement was willfully or corruptly false. Under this condition of the law, can it be said that any other liability or penalty can be applied than that the law itself imposes? Can it be that in this way the common-law action of deceit has been enlarged by statute? Or can it be maintained that this statute overcomes the non-liability declared in the case of *Fusz v. Spaunhorst*? The first canon of construction of a statute law is that "an affirmative enactment of a new rule implies a negative of whatever is not included or is different, and, if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise." *Ex parte Joffe*, 46 Mo. App. 360; *Suth. St. Const.* § 140; *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122. *Suth. St. Const.* (section 208) lays down the rule: "When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed, and humanity would require that it should be so limited in construction." *Sedg. St. & Const. Law* (2d Ed.) p. 341 *et seq.*, points out that, "where a precise remedy for the violation of a right is provided by statute, it often becomes a matter of interest to know whether the statutory remedy is the only one that can be had, or whether it is to be regarded as merely cumulative, the party aggrieved having also a right to resort

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to his redress for the injury sustained, at common law, or independently of the statute. In regard to this we have already noticed the rule that where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but, where a right of property is vested by virtue of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty." And again, at page 343, the same author says: "But, on the other hand, it is a rule of great importance, and frequently acted upon, that where by a statute a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed and the right indicated in no other way than that prescribed by the statute." End. Interp. St. § 465, says: "If the statute which creates the obligation, whether public or private, provides in the same section or passage a specific means or procedure for enforcing it, no other course than that thus provided for can be resorted to for that purpose." This has been the rule followed in Missouri ever since the case of *Riddick v. Governor*, 1 No. 147, where it was said: "It is an incontrovertable maxim of law that a statute imposing a penalty for a new-created offense, or for a breach of duty, and defining the particular mode in which and before what tribunal the penalty shall be recoverable, must be strictly pursued." And then, pointing out that the act under consideration imposed a new duty upon sheriffs and imposed a penalty for its violation, and prescribed the method of enforcement to be pursued and the tribunal to try the cause, the court said: "We are at once led to the conclusion that they [the lawmakers] intended to provide, specifically, an adequate remedy for the neglect of each particular duty thereby created, and a different construction would subject the sheriff to a liability which we cannot reasonably suppose he ever intended to incur." This rule is recognized and approved in *Ellis v. Whitlock*, 10 Mo. 781;

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State v. Canton, 43 Mo. 51; Moore v. White, 45 Mo. 206. So, on the same principle, it was said by NORTON, J., in Parish v. Railroad Co., 63 Mo., loc. cit. 286: "So far as the law is to be regarded as punitive, it should be strictly pursued, and so as not to enlarge the liability it imposes, nor allow a recovery, unless the party seeking it brings his case strictly within the terms or conditions authorizing it. So far as it is to be considered as compensatory for an injury done, it is to be construed as any other statute." This question is set at rest, however, in People's Ry. Co. v. Grand Ave. Ry. Co., 149 Mo., loc. cit. 253, 50 S. W. 829.

Applying these rules to the case at bar, we have this result: Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the secretary of state or to any one else, nor to publish any such statement in the newspapers. The obligation and duty so to do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty should be enforced; that is, made it a misdemeanor, punishable on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by directors of a bank to the secretary of state be made the basis of a common-law action for deceit. The reason is plain. The law enacts the statement; hence it is not voluntarily made. The statement is required to be made to the secretary of state, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common-law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in

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any one which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive, and no other remedy is open to any one.

Proceeding along different lines the courts of other jurisdictions have reached the same result as to the liability of a bank director in a common action of deceit for false statements as to the condition of the bank, where the duty to make such a statement was or was not imposed and the penalty prescribed for a violation of such duty. The principle upon which the directors have been held liable in those cases is that they knew the statement to be false, not merely that they might, by ordinary care, have known that fact, and that, if they acted in making such statements in good faith, upon details furnished by the ordinary managers and clerks whom they have employed, they cannot be held liable in a common-law action of deceit. *Pieratt v. Young* (Ky.), 49 S. W. 964; *Cowley v. Smyth*, 46 N. J. Law, 380; 1 Cook, Stock, Stockh. & Corp. Law (3d Ed.) § 158. By this, however, it must not be understood that no action for deceit will lie against a director of a corporation, banking or otherwise (there is no difference), who has made false and fraudulent representations as to the condition of the bank, whereby others have been misled and damaged. Such misrepresentations need not be personally made, but may consist of voluntary reports or prospectuses which are false, and made fraudulently, and published or circulated. 1 Mor. Priv. Corp. (2d Ed.) § 573. But this rule cannot be invoked in this case, for all evidence of this kind was withdrawn by the plaintiff, so the referee reports, and the right of recovery was placed squarely upon the reports made to the secretary of state. For these reasons the circuit court was right in entering judgment for the defendants on the deceit count of the petition.

3. It is urged, however, that the circuit court had no power to set aside the findings of fact by the referee, and make findings itself, but that it must accept the report

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as to matters of fact, or else set it aside, as in cases at law with reference to the verdict of a jury. This contention finds support in *Lingenfelder v. Brewing Co.*, 103 Mo. 589, 15 S. W. 844. But in that case both sides conceded and contended that such was the law, and the court treated the case as counsel had done. But in *Tobacco Co. v. Walker*, 123 Mo., loc. cit. 671, 27 S. W. 639, the question was contested and decided. There it was held: "In causes wherein the court may lawfully direct a compulsory reference, it may likewise act upon the evidence reported by the referee, and find therefrom different conclusions of fact from those reported by the referee. This should now be taken as settled law, under the rulings in *Hardware Co. v. Wolter* (1886) 91 Mo. 484, 3 S. W. 865, and *State v. Hurlstone* (1887) 92 Mo. 327, 5 S. W. 38, without reopening the question they adjudge. It was hence entirely competent for the trial court in the case at bar to set aside the finding of the referee in favor of plaintiff, and then to find for the defendants upon the evidence reported by the referee." This is the true rule; for while this court, on appeal, has always treated the report of a referee as a special verdict, and refused to disturb it if there was substantial evidence to support it (*Berthold v. O'Hara*, 121 Mo., loc. cit. 97, 25 S. W. 845), still the power of the circuit court is very different; for in such cases, a jury being waived, the case is triable before the court, and, because the court has not the time to try such cases, it calls in the aid of a referee to take the testimony. The referee's power is limited to recommending a judgment. The duty and responsibility as to the judgment rests upon the court. The referee can aid, but not bind, the judge. And, with all the evidence before the court, it would be a useless and expensive proceeding to refer the case to the same or another referee; for, perchance, the referee would find the facts the same way again, and so the expensive luxury would have to be repeated, until some referee could be found who would find the facts as the judge all the while believed they should be found, and as he could and

Reference—Findings of Fact—Province of Court.

Safe-Deposit & Trust Co. v. Diamond Nat. Bank

should have found them upon the coming in of the first report. After full investigation and this protracted discussion, no error has been found in the action of the trial court, and its judgment is therefore affirmed. All concur, except ROBINSON, J., absent.

NOTES.

Insolvency—Liability of Officer for Receiving Deposits—Knowledge.—An officer of a bank who through negligence receives deposits while the bank is insolvent without knowing of its insolvency is not guilty of a crime under Kan. Laws 1891, chap. 43, § 16, making it an offense for any officer of a bank to receive deposits when the bank is insolvent knowing that it is insolvent. *State v. Tomblin*, 57 Kan. 841, 48 Pac. 144.

Care Required of Bank Directors in Supervision of Business.—See *Warren v. Robinson* (Utah). 1 Banking Cases 541, and *note*, 564 *et seq.*

Liability of Directors to Creditors.—See generally *Union Nat. Bank of Kansas City v. Hill* (Mo.), 1 Banking Cases 443, and *note*, 456. See also preceding case, and *note*.

Liability of Directors for False Reports.—See *Gerner v. Mosher* (Neb.), 1 Banking Cases 457, and *note*, 480 *et seq.*; *Stuart v. Bank of Staplehurst* (Neb.), 1 Banking Cases 518, and *note*, 524 *et seq.*; *Bacon v. United States* (C. C. A.), *ante*, 26, and *notes*, 41 *et seq.*

SAFE-DEPOSIT & TRUST CO.

v.

DIAMOND NAT. BANK.

(*Supreme Court of Pennsylvania, Jan. 2, 1900.*)

Deposits by Administrator—Misappropriation—Liability of Bank.*—Recovery cannot be had of a bank of the amount of checks of which an administrator received in such capacity, deposited to his personal account and afterwards drew out and appropriated.

APPEAL by plaintiff from Allegheny county court of common pleas. *Affirmed.*

*See *Meyers v. New York County Nat. Bank* (N. Y.), 1 Banking Cases 72, and *note*, 75 *et seq.* See also 1 Banking Cases 497, *notes*.

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William Kaufman and J. R. Braddock, for appellant.

W. B. Rodgers, for appellee.

PER CURIAM. Upon the checks which were received by the administrator, he had the undoubted right to draw the money; and, if he chose to thereupon deposit the money thus received to the credit of his own account, he had a perfect right to do so. What he did do was nothing more than the equivalent of such action on his part. The money, having gone into his own account, was subject to be drawn out upon his personal checks, which the bank could not refuse to pay. The question is entirely different from the one which would arise if, after the deposit was made, it was claimed as money of the trust, and the bank was notified of the claim before it was paid; but that is not this case. Judgment affirmed.

BRADLEY

v.

CHESEBROUGH *et al.*

(*Supreme Court of Iowa, April 14, 1900.*)

Suit to Impress Trust on Funds in Possession of Bank's Assignee—Evidence—Statements from Bank's Books.—In a suit in equity to impress a trust on funds in the hands of defendants, as assignees of a bank, a witness who had been the bank's bookkeeper, and was one of its assignees, was properly allowed to make statements from the bank's books as to the condition of its assets at certain periods, the books being in court, and plaintiff having had ample opportunity to examine them, and to cross-examine the witness.

Same—Sufficiency of Evidence.*—In such an action, in order for plaintiff to prevail, it is not enough that it appears that the trust money was deposited in and received as such by the bank, and wrongfully converted by it, but it must appear by presumption of law or otherwise, that it has been preserved in the hands of the assignees as an increase of assets which may be taken without impairment to the rights of creditors.

*See *New Farmers' Bank's Trustee v. Cockrell* (Ky.), 1 Banking Cases 687, and *notes*, 696 *et seq.*

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APPEAL by plaintiff from Muscatine county district court.
Affirmed.

Remley, Ney & Remley, for appellant.

Jayne & Hoffman and *Carskaddan & Burk*, for appellees.

DEEMER, J. From an opinion filed by the learned trial judge we extract the following statement of facts, that we find sustained by the record: "John C. Hormel, the decedent, it appears, died intestate on or about the 19th day of April, 1892. He was at the time of his death a resident of Johnson county, Iowa, and A. A. Ball, of the firm of A. A. Ball & Co., bankers at West Liberty, and the active business manager of said firm, was, by the last will of said testator, appointed executor. He accepted the trust, and duly qualified as such executor. The fund which it appears came into his hands, as such executor, was deposited by the executor in the bank of the said A. A. Ball & Co., and amounted up to the 1st of February, 1893, to the sum of \$3,286.76. The defendants claim that at that date the money thus deposited had been paid out in the ordinary course of business by the bank. The balance remaining in the bank to the credit of the estate, according to its books, on the 19th of September, 1896, amounted to the sum of \$3,286.76. At the last date it appears that the said firm of A. A. Ball & Co. and its individual members made a general assignment for the benefit of creditors. On the 7th of April, 1897, some months after the assignment, Mr. Ball was by the court removed from his office as executor of said estate, and the plaintiff appointed administrator with the will annexed. On the 26th day of the same month the plaintiff, as administrator aforesaid, instituted the present proceeding, claiming that, with interest at 6 per cent., there was due the sum of \$4,221.89 at the time the petition was filed. He alleges that Ball, as executor of said estate, deposited the same sums received by him on account of said estate with the banking firm of A. A. Ball & Co., to the credit of said J. C. Hormel estate, who used the moneys as

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received in the banking business as their own money, subject only to be drawn from said A. A. Ball & Co. on proper order of court; that the money so received said Ball, as executor, deposited with the said banking firm, increased, bettered, and improved said estate therewith, and turned over all of said estate so bettered and improved thereby, under their deed of general assignment for the benefit of creditors, to the said Chesebrough and Giesler, who hold the same in their hands under said assignment. The plaintiff further alleges that said A. A. Ball & Co. had actual knowledge of the fact that the money deposited to the credit of the John C. Hormel estate was trust money in the hands of Ball, as executor, and formed a trust fund in the hands of A. A. Ball & Co., and that with this knowledge Ball & Co. wrongfully converted to their own use money which it was their duty to preserve. The defendants, in answer to the claim of the plaintiff, in substance say that no part of the money thus deposited came into their hands under the deed of assignment, and that none of it exists in any other form in the assets that they received as assignees. There is no dispute as to the fact that the money belonging to the Hormel estate was by A. A. Ball, the executor of said estate, deposited in the bank of A. A. Ball & Co., and by it wrongfully used in the course of its business. The real question, then, is this: Was the said fund or some part of it preserved in some form by the said insolvent banking firm at the date of the assignment? The cash in the bank at that date, that appears to have come into the hands of the assignees, was but a few cents less than \$450. There was a very large amount of notes, but these notes represented loans that were improvidently made, and at the date of the assignment were some of them worthless, and others of but little value. The notes on hand, good and bad, and which were delivered to the assignees, amounted in all to the sum of \$245,801. At the time the case was submitted to the court the gross collections on notes was \$87,572, and set-offs allowed against them

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was \$7,407.92, leaving as the net amount received by the assignees the sum of \$80,093.48.

In addition thereto, it may be stated that after the receipt of the money, and down to May, 1893, there was a steady increase in the assets of the bank. About the last-named date the historic panic of 1893 came on, and the assets of the bank gradually and surely decreased, until the bank was forced to make an assignment for the benefit of its creditors. It also appears that at the time the deposit was made which plaintiff seeks to recover there was due from the bank to depositors \$296,077.77. When the assignment was made, this amount had been reduced to \$180,610.25. After the beginning of the year 1893, the bank made no new loans, except from money borrowed from other banks. One of the assignees, who was also one of the employees and a book-keeper of the bank, testified that none of the assets acquired by the bank after June 1, 1893, came into the hands of the assignees, save such as were procured with money borrowed as above stated. This same witness also testified that the bank received notes, after the date of the deposit and before the assignment, to the amount of nearly \$108,000, that were uncollectible, and he also testified that during the same time the bank allowed overdrafts to the amount of \$10,593 that cannot be collected. During this same period the bank was paying interest on time certificates at the rate of 5 per cent. The amount of these certificates was something like \$148,000. It was also paying the ordinary current running expenses. The same witness to whom we have referred further testified that he was unable to tell, either from memory or from the books of the bank, where the money belonging to the Hormel estate was invested; that it was so mixed with other funds that he was unable to tell where it is, or what debt was paid with it; and that "it may have been invested in notes that we have in our hands as assignees, or it may have been paid out in cash in the general manner of carrying out the business." The claims filed against the assignees amounted to nearly \$240,000. Some of the items to which we have

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referred are gathered from statements made by the witness hitherto mentioned, who was a bookkeeper in the bank, made up from the books of the bank. The books from which they were taken were produced at the trial, but were not offered in evidence, as we understand it. If they were offered, they are not included in the abstracts, and have not been sent to this court.

Plaintiff objects to the statements on various grounds, but we think they were properly admitted in evidence, and should be considered on this appeal. *State v. Cadwell*, 79 Iowa 432, 44 N. W. 700; *Casey v. Banking Co.*, 98

Iowa 107, 67 N. W. 98; *Von Sachs v. Kretz*, 72 N. Y. 548. The books were present in court, and plaintiff had ample time and opportunity to examine them and to cross-examine

Suit to Impress
Trust on Funds
in Possession of
Bank's Assignee
—Evidence—
Statements from
Bank's Books.

the witness. The witness stated that the lists he presented were correct and were taken from the books of the bank. He was an officer of the court, and had charge of the books, and was asked to make statements therefrom, and to state the condition of the assets. Such evidence was certainly competent. At the time the bank received the money belonging to the estate, it had cash on hand and with other banks amounting to about \$36,000, and it had in bills receivable about \$320,000. Its total liabilities at that time were about \$319,000, not including its liability to the individual partners. During the time between July 1 and September 1, 1893, the deposit account was reduced more than \$30,000. At the time of the assignment the books showed that the bank had in cash and with other banks about \$3,800, although as a matter of fact but about \$450 in actual cash was turned over to the assignees. It had in bills receivable about \$245,000. Its deposit account had been reduced from about \$296,000 in February, 1893, to about \$180,000 at the time of the assignment. Its bills-payable account, which was \$10,000 at the time it received the money of the estate of Hormel, amounted at the time of the assignment to \$22,500. But its indebtedness to other banks was a little larger in 1893 than in 1896.

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It paid out for interest during this time about \$21,000, and the amount of uncollectible notes it had at the time of the assignment has already been stated. There is an apparent discrepancy in the evidence regarding the amount collected by the assignees. The trial court found it amounted to something over \$80,000, but this, no doubt, refers to the amount collected on notes for both the assignees. Admit that they have collected something over \$138,000, about \$17,000 of this last-named amount was collected on the overdraft account, which amounted to about \$37,000 at the time of the assignment. Then one of the members of the banking firm turned over his individual property to the assignees, and quite an amount of money was collected therefrom. The assignees have already declared a dividend of 50 per cent. to the general creditors, besides paying a preferred claim amounting to over \$6,100, and they say they will be able to pay another dividend of 15 per cent. The assignees received the bills receivable owned by the bank, the small amount of cash found in its drawers, and the property of the individual members of the banking firm.

These are as near the controlling facts as it is possible to gather them from the record. We have so recently considered the law applicable to such facts that it is unnecessary to do more than refer to a few of the more recent

Same—Sufficiency of Evidence.

cases. In *Jones v. Chesebrough*, 105 Iowa 303, 75 N. W. 97, which involved the same bank as the case at bar, we said that, "where trust money has been received, it is not material whether it is preserved in the form of money or other property, but it must appear, by presumption or otherwise, that it has been preserved in the hands of the assignee as an increase of assets in his hands which may be taken without impairment to the rights of creditors." There, as here, it appeared that the bank made no new loans, nor acquired any kind of property with money belonging to plaintiff's estate, unless it be in the overdraft account. It also appeared that from the time of the receipt of the plaintiff's money, down to the time of assign-

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ment, the amount paid out to depositors largely exceeded the amount received from them. The evidence in this case shows from some time in 1893, down to the making of the assignment, the same state of facts. There, as here, the money plaintiff sought to recover was mingled with other money of the bank, and used by it in the usual and ordinary course of banking and in the payment of its debts. In view of this state of the record, we may with propriety quote again from that case: "While the payment of debts in that manner by a trust fund lessens the indebtedness of an insolvent estate, and may thereby increase the percentage of dividends declared from other funds, it does not follow that the assignee has any increase of assets because of it. It may follow that he has less debts to pay, and the estate is in that way benefited. But such a benefit to creditors is but partial, and, if such a payment is to serve as a reason for withdrawing an equal amount from the assignee, the result is an absolute loss for the creditors."

On behalf of plaintiff it is contended, however, that for a time after the deposit of the money of the estate the bank was in a prosperous condition, and was increasing its assets; that its financial troubles began with the panic of 1893; and that we should presume that the money in question was used in such a manner as to increase its assets. If that were the only showing in the case, there would be much force in plaintiff's contention. Although, if there is any presumption in the case, we suppose it ought to be that Ball, as executor, would not invest money belonging to the estate he represented without an order of court, and that, if he loaned the money, he would take the investment made to represent it, not in the name of the bank, but in his own name, as executor. The primary question, however, is not whether the assets of the bank may have at one time been increased by this deposit. That result follows when any deposit is made. But was there an increase in the assets that came into the hands of the assignees? These assets we have already mentioned, and it is clear that the deposit did

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not increase the property or fund received by them from the individual members of the banking firm. It could not have gone into notes executed prior to the time it was received, and the evidence shows beyond question that no loans, other than renewals, were made by the bank after the deposit of the money belonging to the estate that plaintiff represents, except from money borrowed of other banks. Plaintiff's money is therefore not in the bills receivable. But, if it were there, the loss on this item of more than \$107,000 makes the rule announced in *Jewell v. Clay*, 107 Iowa 56, 77 N. W. 511, to which we will hereafter more particularly refer, apply.

If any fund in the hands of the assignees has been increased, it must be the overdraft account. There was a loss on this account of more than \$10,000. However, a trust fund amounting to about \$6,200 was allowed, which must have been taken from the amount received on overdrafts, as there is no other fund from which it could rightfully be taken.

Again, during the period between the deposit and the assignment the bank paid out about \$20,000 in interest, besides the usual and ordinary expenses of the bank. Moreover, at the time the funds of the bank were being augmented deposits were made by other people, and there is no means by which it may be told what, if any, of the deposits made for the estate went into this overdraft account. If it was argmented, the losses and payments to which we have referred have certainly exhausted all that went to the assignees. The same thought applies with equal force to the cash found in the bank when the assignees went into possession.

Again, it appears that between a time shortly after the deposit that plaintiff seeks to recover was made and the failure of the bank there was withdrawn from the bank by other depositors more than \$100,000. As said in the *Jewell-Clay Case*, *supra*: "In view of this evidence, it cannot be presumed that the property in which the loan (deposit) was invested was and continued to be of the full value of the loan,

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and that it passed to the assignees, and that the depreciation and loss were wholly in other property." In that case the firm was solvent when the money was received, but during the financial crisis of the year 1893 it became involved, and its assets decreased from 100 to 12 per cent. None of the cases relied on by appellant, unless it be *Plow Co. v. Lamp*, 80 Iowa 722, 45 N. W. 1049, are in conflict with our conclusions. In *Independent Dist. of Boyer v. King*, 80 Iowa 500, 45 N. W. 908, there was no showing as to what the assets were in the hands of the assignees, nor from what funds they had been derived. The case turned wholly on presumptions. It is there said: "It will be presumed, in the absence of a showing to the contrary, that it [the money] was preserved by them [the bank] in some form, and that it passed into the hands of their assignee." In *Nurse v. Satterlee*, 81 Iowa 495, 46 N. W. 1102, the money deposited was traced directly into a fund held by another bank. In *District Tp. of Eureka v. Farmers' Bank*, 88 Iowa 194, 55 N. W. 342, the assignees and the creditors made a showing to the effect that certain real property held by the bank was acquired before plaintiff made its deposit, and this property was held not liable to be impressed with a trust. The assignees' contention was that a considerable amount of property transferred to him was not in any manner augmented by the plaintiff's deposit. He made no showing as to the other assets in his hands, and, after holding that no trust should be impressed on the real estate, we said: "The burden was upon the assignees to show that it [the deposit] contributed nothing to the estate which they acquired by virtue of the assignment." To the extent that they had met that burden, we held the estate not liable. In *Re Knapp*, 101 Iowa 488, 70 N. W. 626, there was no showing whatever by the assignee as to the assets in his hands, or as to how these assets were accumulated. As already intimated, there are some things said in the *Davenport Plow Company Case* that seem to run counter to the

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rules herein announced; but in that case there was no showing by the assignee as to the assets received by him, or as to when or how they were acquired by his assignor. That part of the opinion on which plaintiff relies is purely dictum, and was disapproved in *Jones v. Chesebrough*, *supra*. In the case at bar it is shown that no part of the deposit plaintiff seeks to recover went into the bills receivable, and that, if it did, there has been such a large shrinkage therein as that they cannot be said to have been augmented thereby; that, while some of it may have gone into the overdraft account, that account has been so diminished, and was of such a character, that plaintiff should not be allowed to profit therefrom at the expense of general creditors. Whatever presumption might have obtained in the absence of proof has been rebutted, or, at least, such a showing has been made as to render it entirely probable that much, if not all, of the deposit was lost. That plaintiff was a trust creditor does not, of itself, entitle him to preference over general creditors. To obtain that right, he must show, by presumption of law or otherwise, that his fund has been preserved in the hands of the assignee, as an increase of the assets of the estate, from which it may be taken without impairment of the rights of general creditors. *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504; *State v. Bank of Commerce (Neb.)*, 75 N. W. 28; *Jones v. Chesebrough*, *supra*. As sustaining our conclusions, see, also, *Insurance Co. v. Caldwell (Kan.)*, 52 Pac. 441; *In re Irish-American Bank (Minn.)*, 73 N. W. 7; *Hubbard v. Manufacturing Co. (Kan.)*, 37 Pac. 626. It may be observed, in closing, that *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 123, 214, on which the dictum found in the *Plow Co. Case* was based, was overruled in *Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383. Our conclusion is that the decree is right, and it is affirmed.

Omaha Nat. Bank v. Kiper

OMAHA NAT. BANK

v.

KIPER *et al.**(Supreme Court of Nebraska, March 21, 1900.)*

Pleading—Appeal.—A petition which is attacked for the first time in this court on the ground that it does not state a cause of action will be liberally construed.

Harmless Error.—Where the trial is to the court without a jury, it is not reversible error to admit incompetent evidence.

Collections—Duty of Bank.*—A bank which undertakes to collect a draft is bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment.

Same—Liability of Bank.—In case a debt is lost through the negligence of a collecting agent, the measure of damages is the actual loss resulting from such agent's omission of duty.

(Syllabus by the Court.)

ERROR by defendant to Douglas county district court.
Affirmed.

Hall & McCulloch, for plaintiff in error.

Edson Rich, for defendants in error.

SULLIVAN, J. The defendants in error, who will be hereafter referred to as the plaintiffs, brought this action to recover of the Omaha National Bank damages resulting, it is claimed, from the bank's negligence in connection with a certain draft sent to it for collection. Case Stated.

The cause was tried without the aid of a jury, and resulted in a finding and judgment against the defendant for the amount claimed in the petition. The material facts are here set out: On November 9, 1894, the plaintiffs, who were partners doing business in the city of Chicago under the firm name of Kiper & Sons, drew a sight draft on F. T. Dow, an Omaha merchant, and forwarded it to the defendant

*See notes at end of case.

Omaha Nat. Bank *v.* Kiper

for collection. On November 12th the bank notified the plaintiffs by letter that the draft had been presented, and that the drawee had requested 20 days' further time in which to make payment. On November 14th the plaintiffs wrote to the bank, saying: "We are agreeable to your holding draft for Mr. Dow, and he can pay the same in twenty days from the 12th inst., as per his request. Please have him accept the draft for payment then, and hold the same for collection." This letter was received by the defendant on November 15th, and on the same day it again presented the draft to Dow, and requested him to accept it. He refused to give an acceptance due in 20 days, but proposed to give one due in 30 days, and the proposal was agreed to by defendant. The bank retained the acceptance, but did not advise the plaintiffs of the action it had taken. On December 4th the plaintiffs wrote the defendant, making some inquiry about the draft, and in due time received a reply, which, in substance, stated that it could not be found, and must have been returned to the drawer. On December 7th Dow failed in business, of which fact Kiper & Sons were not informed until December 15th. On December 10th the bank, replying to a letter written by the plaintiffs on December 8th, said: "In reply to your letter of 12/8/94, regarding draft on F. T. Dow, which we hold for collection, when we presented the draft the second time, Mr. Dow claimed a 30-day extension, and we allowed him to accept it payable Dec. 15/94, intending to write you to confirm our action, which we must have neglected to do. We will use our best endeavors to collect on the 15th." On December 17th the draft was returned to Kiper & Sons, who, on the same day, wrote the defendant, saying: "Draft against Dow, which you return to us unpaid, we send to you again in this letter, as there must have been some misunderstanding regarding your giving Mr. F. T. Dow extension until Dec. 15th. We wrote you Nov. 14th that you could give him twenty days from Nov. 12th, as per his request. We did not hear from you, and about the time the twenty-days extension was up we

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wrote you, and you then wrote us that you had no collection from us against Dow. We could not understand this, as we sent you the collection again Nov. 14th. A few days ago we received a letter from you stating that you had given Dow until Dec. 15th for payment, and that you expected to collect the draft then, and would remit. We are at a loss to understand why you returned the draft back unpaid, as you no doubt are aware that Dow has failed in business. We surely expect you to look after our interest in this matter, as you have extended time to Mr. Dow beyond the authority which we gave you." To this letter the bank, on December 19th, sent a reply, which is in part as follows: "We will certainly look after your interests in matter of Dow collection. Shall have our attorney see Dow and others at once. We feel our clerk was not doing just right when he allowed Dow to accept the draft Dec. 15, but he claims it was the best he could do."

The first assignment of error relates to the sufficiency of the petition to support the judgment. The pleading is, perhaps, inartificially drawn, but we think it states a cause of action for negligence. It states, in substance, the facts above detailed; alleges that Dow has been insolvent since December 7th, and that the draft cannot be collected from him; that plain-
tiffs could and would have collected, or obtained security for, their claim immediately, had they known that their debtor had refused to give an acceptance payable in 20 days. There is no direct averment that the plaintiffs have been damaged, but it is charged that the defendant has become liable to them by reason of the facts pleaded, for the amount of the draft. The petition was not assailed in the trial court, and the rule is that it should now receive a liberal construction, with the view of giving effect to the pleader's purpose. *Latenser v. Misner*, 56 Neb. 340, 76 N. W. 897. A party who fails to disclose in the trial court his objections to an adversary's pleading cannot well complain if this court is "to its faults a little blind, and to its virtues very kind."

Pleading—
Appeal.

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The fourth assignment of error is that the court erred in permitting Julius Kiper to testify to the contents of the letter written by plaintiffs to defendant on December 4th, and the

Harmless Error. reply of the defendant thereto. There was, under the circumstances disclosed, no error in the ruling; but, if there had been, it would not warrant a reversal of the judgment, the cause having been tried without a jury, and the evidence in question not being indispensable to a recovery.

The fifth specification of error is based on the ruling of the court refusing to exclude the following testimony of Julius Kiper: "Int. 13. What notice, if any, did the bank give you at the time you forwarded the draft to them the second time, with the authority that they could accept a twenty-day acceptance of the draft by T. F. Dow, of his acceptance or nonacceptance of the same? Ans. 13. They gave us no notice whatever, and, in fact, had they notified us that Dow would not give a twenty-day acceptance, we would have withdrawn the draft at once, and gone to Omaha, and attempted to get Mr. Dow to secure our claim." The contention of counsel is that the answer is not responsive to the question, that it is incompetent, and the statement of a conclusion. The answer is irresponsive in part, but that objection was not made at the trial. The objection made was properly overruled. It is difficult to conceive upon what ground the court would be justified in striking the whole of the answer from the record.

This further question was propounded to Mr. Kiper: "Int. 14. What course would you have pursued had the bank notified you promptly of the acceptance or nonacceptance by Mr. Dow of the twenty-day extension offered him?" An objection by defendant's counsel being overruled, the witness proceeded to state what steps he would have taken to obtain satisfaction of his claim. We see no valid objection to this testimony, but, if it were incompetent, it is perhaps needless to say that its reception was not reversible error, since the cause was tried by the court without a jury.

Notes

It is finally contended that the evidence does not support the judgment. We think otherwise. The bank undertook to act as the agent of the plaintiffs in collecting their claim against Dow. It was bound to keep within the authority conferred upon it, and exercise proper diligence to obtain payment. 1 Am. & Eng. Enc. Law (2d Ed.) 1066. If the debt was lost through its fault, it is liable. *Buell v. Chapin*, 99 Mass. 594. The measure of damages in such case is the actual loss resulting from the agent's omission of duty. If there is a reasonable probability that the entire debt would have been collected but for the agent's negligence, the amount of the claim is the measure of recovery. *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York City*, 77 N. Y. 328. In the recent case of *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844, it is said: "It is claimed that there was no proof of damages; that is, that it was not shown that, had the bank been diligent, the drafts could have been collected. In such cases it is usually impossible to show with certainty that, if due care had been observed, the collection would have been made. The law is not so rigid in its requirements for the protection of the negligent agent. It is only necessary to show a reasonable probability that, with due care, the collection would have resulted. The burden rests on the defendant to show that there was no damage." There were in this case probable grounds for believing that the loss of the draft was due to defendant's default, and that, but for such default, the loss would not have occurred. The question was for the trier of fact to decide and we are satisfied that the decision given does not lack adequate evidence to support it. The judgment is affirmed. Affirmed.

Collections—Duty of Bank.

Same—Liability of Bank.

NOTES.

Collections—Bank as Depositor's Agent.—A bank receiving an item for collection is the agent of the depositor or holder of the item in making the collection. *Hazlett v. Commercial Nat. Bank*, 132

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Pa. St. 118; Ward v. Smith, 7 Wall. (U. S.) 451; Dodge v. Freedmans Sav. & Trust Co., 93 U. S. 379; Smith v. Essex County Bank, 22 Barb. 627; Alley v. Rogers, 19 Gratt. (Va.) 383.

As to duty of agent to follow instructions, see 1 Banking Cases 138, *note*.

Collections—Liability of Bank for Negligence.—See Martin v. Home Bank (N. Y.), *ante*, 112, and *note*, 120 *et seq*.

GREGG

v.

BIMETALLIC BANK.

(*Court of Appeals of Colorado, Jan. 8, 1900.*)

Collections—Liability of Bank Returning Funds.*—Papers transferring the title to certain property and a check on a foreign bank for the purchase price of the property were deposited with defendant bank, the papers to be delivered to the purchaser when the bank had collected the check and deposited the proceeds to plaintiff's credit. The defendant bank forwarded the check, which was honored, and a draft for the amount of which was mailed, but before the draft was received the foreign bank and the purchaser requested the return of the draft, which the defendant did. *Held*, that the defendant bank was estopped to say that it had not received the money, and that plaintiff could recover the amount of the draft.

APPEAL, by plaintiff from Arapahoe county district court. *Reversed*.

F. E. Gregg and *S. L. Carpenter*, for appellant.

J. Stanley Jones and *Chas. C. Butler*, for appellee.

THOMSON, J. On April 25, 1896, a transaction took place between the appellant, a resident of Colorado, and Isaac A. Barnes, a resident of Minneapolis, Minn., whereby the latter purchased a lot in Cripple Creek, Colo. The record title to the lot was in John H. Gregg, a brother of the appellant, who resided in St. Joseph, Mo., but the appellant was inter-

*See preceding case and *notes*.

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ested in the proceeds of the sale. An abstract of the title to the property was procured by the appellant for Mr. Barnes, also a quitclaim deed from an outside party to cure some defect in a former deed by him, and an opinion upon the title. These papers, together with a deed to Mr. Barnes for the lot from John H. Gregg, were taken by both parties to the banking house of the appellee, and placed in an envelope, which was sealed, and on which was then indorsed the following memorandum :

“Cripple Creek, Colo., Apl. 25th, 1896.

“This * * * witnesseth that John H. Gregg has this day sold, and Isaac A. Barnes has bought, lot 10, block 17, Cripple Creek, Colo., for the following consideration, *viz.* \$750 and 10,000 shares of the capital stock of the Uncle Sam Mining & M. Co., and said Barnes deposits a check for said \$750. When said money is collected on said check, and said stock delivered to said bank, then said bank shall deliver to said Barnes all the within papers; said money to go to the credit of F. E. Gregg.

“J. H. Gregg, by F. E. Gregg.

“F. E. Gregg.

“Isaac A. Barnes.”

The envelope, so sealed and indorsed, was then delivered to the cashier of the appellee, together with a check drawn by Barnes on the National Bank of Commerce of Minneapolis, Minn., payable to the order of the appellee, for \$750, with authority to it to proceed in accordance with the agreement contained in the memorandum. The appellee accepted the trust, and became a party to the agreement. It immediately forwarded the check of Barnes to Minneapolis for collection. The check was duly honored, and the Minneapolis bank's draft on Chicago for the amount, less exchange, sent by mail to the appellee. On the 30th day of April, 1896, the appellee received the following communication from Barnes :

“Denver, Colo., Apl. 30th, '96.

“The Bimetallic Bank, Cripple Creek, Colo.—Gents: The check I made payable to you for \$750, dated Apl. 25th, '96,

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if you have not yet sent it to Minneapolis, Minn., for collection, please send same to me at Minneapolis, Minn. If you have received draft from Minn. bank, please return the same to National Bank of Commerce, Minneapolis, Minn. I am not satisfied with the title to the property, among other things, I expected to purchase.

"Yours, truly,

Isaac A. Barnes."

On the 1st day of May, 1896, the appellee received from the bank at Minneapolis a telegraphic message, as follows:

"4:30, 189-. Minneapolis, Minn.

"To Bimetallic Bank: Please return our draft remitting for Barnes check seven hundred and fifty.

"National Bank of Commerce."

On the 2d day of May, 1896, the draft of the Minneapolis bank reached the appellee. The following statement accompanied the draft:

"Minneapolis, Minn., Apl. 29, 1896.

"Nat. Bank Com., E. P. Arthur, Esq., Cas., Cripple Creek, Colo.:

Inclose please find our draft on Chi.....	\$749 25
Exchange	75

\$750 00

"In payment of collection in yours of 4/25, No. 17,409.

"Us

"Yours, respectfully,

"H. H. Thayer, Cashier."

Immediately upon its receipt, the appellee returned the bill to the drawer. The appellant had no notice of any of the transactions relating to the check. From time to time he inquired of the bank what had become of it, and received evasive answers which gave him no information. He remained in ignorance of what had actually occurred until July 18, 1896, when he ferreted out the facts, and discovered that the check had been paid by a draft, and the draft sent back to the drawer. He then demanded from the appellee that it account to him for the proceeds of the check, and was

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refused. He brought this suit to recover the amount. The court deduced the following conclusions from the facts, awarding its judgment to the defendant: "Barnes made the bank his agent for the collection of the check deposited by him for \$750. Gregg had no interest in the check until the same was paid. The escrow fixes the position of the parties relative to the check very clearly. 'Said Barnes deposits a check for \$750. When said money is collected on said check, and said stock is delivered to said bank, then said bank shall deliver to said Barnes all the within papers; said money to go to the credit of F. E. Gregg.' The stipulation shows that the Minnesota bank remitted by draft; that, before the draft was received by the defendant bank, it received word from the Minnesota bank to return the draft,—that is, the draft was stopped in transit. I cannot agree with counsel for plaintiff that it was a payment when the draft was mailed in Minneapolis. The Minneapolis bank controlled the paper until it was paid by the drawee bank of Chicago."

The controlling facts are not disputed. They are: First, the delivery by the parties to the defendant bank of the title papers and the check, with a memorandum, signed by them, showing the purpose of the deposit, and containing the agreement by which the defendant was to be guided; second, the acceptance by the defendant of the deposit, with its accompanying conditions; third, the forwarding by it of the check to the Minneapolis bank for collection; fourth, the payment of the check by the latter bank in a draft sent by mail to the defendant; fifth, the return by the defendant of the draft, as soon as it was received, to the bank from which it came; and, sixth, the refusal of the defendant to account to the plaintiff for the proceeds of the check. The check was payable to the defendant, but the money for which it called belonged to the plaintiff. So far as the check was concerned, the relation of the defendant to him was that of trustee. Its duty to him was that of trustee, and it owed no duty to any person other than him. The draft was sent to it in payment of the check.

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It was notified by the statement which accompanied the draft that the check had been paid, and that the draft represented its proceeds. Instead of converting the draft into money, and placing the amount to the plaintiff's credit, as it was bound by the conditions of the escrow to do, at the request of the Minneapolis bank, to which it was under no obligation, it returned the draft, and thus deprived itself of the power to realize the money upon it. The court based its judgment exonerating the defendant upon two grounds: First, that the act of the drawer in requesting the return of the draft was a stoppage *in transitu*; and, second, that the drawer had the right to stop the draft in transit. Neither of these grounds is tenable. The direction to the defendant was not a stoppage *in transitu*, and no condition existed to authorize a stoppage. The doctrine of stoppage *in transitu* gives to a vendor of merchandise upon credit the right to follow and reclaim the goods in case of the intervening insolvency of the vendee; but he must exercise the right before they come into the vendee's possession. When they have been delivered to the purchaser, they have ceased to be in transit, and the right is at an end. *Muller v. Pondir*, 55 N. Y. 325; *Weber v. Baessler*, 3 Colo. App. 459, 34 Pac. 261. The principle which underlies the right has been held to be available to a vendor of negotiable paper; but, as in the case of merchandise, the paper must be reclaimed while it is in transit. *Canterbury v. Bank*, 91 Wis. 53, 64 N. W. 311, 30 L. R. A. 845; *Muller v. Pondir*, *supra*; *Daniel*, Neg. Inst. § 67. The Minneapolis bank did not undertake to recover the draft while it was in transit. It gave no notice to the postal authorities not to deliver it to the defendant. It addressed, instead, a request to the defendant, the payee, to send it back. The direction contemplated the delivery of the draft to the defendant, and could not possibly be effective until such delivery. But when the draft came into the defendant's hands it was no longer in transit, and the right to reclaim it, if any existed, was at an end.

But no condition existed upon which the Minneapolis bank might lawfully reclaim this draft. It is the insolvency of the

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purchaser, occurring before the goods have been received by him, that authorizes the seller to stop them. The latter has received no pay for them. If they get into the buyer's hands, they will be lost to him; and, in consideration of the equities in his favor, the law permits him to protect himself by arresting the property, if he can, before it reaches its final destination. There was no such situation in this case. The Minneapolis bank did not sell the paper to the defendant on credit, and the latter did not become insolvent. The former was paid in full for the draft before it was made. In obedience to Barnes' order, it transferred the amount to itself from money in its possession belonging to him, and, after deducting its charge for exchange, remitted the balance to the defendant, in the form of a draft, in accordance with the usage of banks. Barnes was bound by its act. It had received its money and needed no protection. It lost all control of the draft by committing it to the mail; and thereafter the paper was the property of the defendant, subject to the trust which it had assumed in favor of the plaintiff. *Whiting v. Bank*, 77 N. Y. 363; *Canterbury v. Bank*, *supra*. We can only surmise the reason which the defendant assigned to itself for its action in surrendering the draft. Its answer furnishes no solution of the question, and its evidence is equally unsatisfactory. It appears that Barnes, on the day after his check was paid in Minneapolis, requested the defendant to return it to him, saying he was dissatisfied with the title to the property he had purchased. Of course, the bank did not return his check. The paper was beyond its control, and had already been paid and canceled. The defendant nowhere says that its conduct was influenced by the communication from Barnes. But this, coupled with the message from the Minneapolis bank, furnishes the only conceivable explanation of the course the defendant pursued. If Barnes was of the opinion that he had valid cause for rescinding the sale, he could have commenced his action for the purpose, and enjoined the bank from paying over the money until the suit was determined. But he did not resort to any constituted

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tribunal. Although the legal title to the draft was in the defendant, in equity the plaintiff was its owner; and the bank seems to have resolved itself into a court, rendered judgment for Barnes, and, without notice to the plaintiff, confiscated his property. Its arbitrary conduct finds no extenuation in the letter of Barnes. Neither does the instruction from the bank at Minneapolis afford any better protection. That bank had no right to require a return of the draft, and the defendant had no more right to return it than the other had to demand it.

The defendant attempts to say that by the terms of the agreement of escrow it could incur no liability to the plaintiff until the money should come into its hands, that the draft was not money, and that it never received the money. The purpose of the draft was to produce the money. The defendant, by its own voluntary act, deprived itself of the power to obtain the money. It cannot allege its own wrong in its defense. It is estopped to say that it did not receive the money, and when it relinquished the security which represented the money its liability to the plaintiff was complete. The judgment will be reversed, and the district court directed to enter judgment in favor of the plaintiff for \$749.25, with legal interest from the 18th day of July, 1896. Reversed.

FIRST NAT. BANK OF CHICAGO

v.

CITIZENS' SAV. BANK OF DETROIT.

(Supreme Court of Michigan, March 13, 1900.)

Collections—Sending Directly to Drawer.*—Although it is negligence in a collecting bank, unless instructed to do so, to send the collection directly to the drawer, a bank in D. receiving for collection

*See *Kershaw v. Ladd et al.* (Ore.), 1 Banking Cases 271, and extensive note, 284 *et seq.*

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a certificate of deposit issued by the only bank in B., with instructions from the forwarding bank to secure the best rate of exchange, and stating that it knew that the D. bank had a correspondent in B., is not negligent in sending, in good faith, the certificate directly to the issuing bank,—its only possible correspondent in B., as the lowest rate of exchange could be obtained in no other way; especially as the issuing bank's rating was known to be good.

ERROR by defendant to Wayne county circuit court.
Reversed.

Barbour & Rexford, for appellant.

Bowen, Douglas & Whiting, for appellee.

LONG, J. On September 6, 1898, the plaintiff bank received for collection from the National Bank of California, at Los Angeles, a certificate of deposit for \$1,650, and interest thereon, issued to the order of J. R. Wallace by D. F. Parsons, a private banker at Burr Oak, Mich., under date of February 2, 1898. The certificate was indorsed and made payable by Wallace to the order of the bank of Whittier, Cal., by it to the National Bank of California, and by it to the First National Bank of Chicago. On September 6th, the day of its receipt, the First National Bank of Chicago indorsed and made it payable to the order of the defendant bank, and forwarded it by mail to that bank at Detroit, with the following instructions:

The First National Bank of Chicago.

Chicago, Ill., Sept. 6, 1898.

Citizens' Savings Bank, Detroit, Mich.—Dear Sir: I inclose items as per statement below for collection and returns.

Yours, respectfully,

R. J. Street, Cashier.

Protest all paper unless otherwise instructed.

Burr Oak, 1650 and Int.

38.50

1688.50

Telegraph if not honored (rubber-stamped).

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Do not hold any of our collections after due for any reason whatever, except upon special instructions from us. Return at once if not paid.

Accompanying the above letter, and pinned to the certificate of deposit, there was a red slip, as follows:

Citizens' Savings Bank.

Detroit, Mich.:

We send this C-D for \$1650.00 and Int. to you for collection, as we note that you have a correspondent at Burr Oak, Mich. Please collect for us at your best rate of exchange, and oblige.

First National Bank,
A. Chicago.

9-6-'98.

Kindly take this ticket off before forwarding to Burr Oak.

Also, accompanying the certificate, and pinned to it, were two slips, of which the following are copies:

608.

Telegraph if not honored. If telegraphing, communicate only with the First National Bank of Chicago, Ill. (giving date of their indorsement stamp), who will give instructions direct.

First National Bank,
Chicago.

Collection. No. 8.

Ac't Nat'l Bank of Cal.,
Los Angeles, Cal.

Date, Sept. 6, 1898.

Burr Oak, \$1650.

Int.,

T. N. P.

8-3.

Do not write or mark or stamp on this ticket.

Protest.

Return promptly if not paid.

The agent of the First National Bank of Chicago, who

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forwarded the certificate to defendant, testified on cross-examination that "the certificate was sent to the defendant bank (a bank, as a rule, we never send anything to). We sent it to them for the simple reason that we presumed that they knew all about this D. F. Parsons, having had his account for several years, and we didn't know anything about him. He was a private banker in Burr Oak, Mich. I had sent items to Parsons for a number of years previous to this, —small items; but had never sent him as much money as that. I had no sufficient knowledge of him to send him more. Q. This red ticket states: 'We note you have a correspondent at Burr Oak.' Do you know who that correspondent was that you noted at that time? A. There being only one bank at Burr Oak, there could not be any question about it. He was D. F. Parsons." It appears that the defendant bank, on receipt of the certificate of deposit from plaintiff, which was September 7, 1898, sent it forward to D. F. Parsons, Burr Oak, Mich., stating that it was inclosed for collection, and asking him to report promptly. Parsons received this certificate, and on the 12th of September handed it to his clerk, and told him to give the Citizens' Savings Bank of Detroit credit for it. The clerk testified that, according to the books of D. F. Parsons, there was a balance in the Citizens' Savings Bank due Mr. Parsons of about \$28,000. The clerk testified, further, that it was the custom of business that when the Citizens' Savings Bank sent collections to Mr. Parsons, if it was a certificate, they merely gave the bank credit on the books. If it was a check or draft for collection, they would collect it before they gave credit; that business had been conducted in this way for over five years. The witness further testified: "We would remit to the Citizens' Savings Bank every day, or twice a day, or once in two or three days. If our books showed a balance to the Citizens' Savings Bank in our favor, we would remit just the same. We would remit to the Citizens' Savings Bank for a draft or check drawn on our bank. The Citizens' Savings Bank had never sent

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anything on our bank for collection before that was drawn on us, and I didn't notice this until afterwards. My father made an assignment for the benefit of creditors on the night of the 13th of September, 1898. Mr. Himebaugh, the assignee, has the statement the Citizens' Savings Bank rendered. On September 15, 1898, I did not know anything about my father's indebtedness to the Citizens' Savings Bank. What I have learned about it since is what has been told me. Within ten days or two weeks after his assignment, my father left Burr Oak, and does not live there now." The cashier of defendant bank testified that he received this certificate of deposit on September 7th, and on the same day he forwarded it on regular collection letter head to Parsons, with instructions to remit. The witness was then asked: "Q. What construction did you place upon Exhibit 3?" (Exhibit 3 is the letter to the defendant bank in which it was said: "We send this C-D for \$1650.00 and Int. to you for collection, as we note that you have a correspondent at Burr Oak, Mich.") This was objected to, and objection sustained. "Q. How did you regard Mr. Parsons at that time financially?" This was objected to; and the court said: "It seems to me that this is not the point. If they thought that he was responsible, didn't they assume the risk? Here is a note one of us has made for a large amount. We all know the usual practice of sending a note for collection is not to send it to the maker of the note. While in a good many instances it would be safe to send a note to the maker of it, does not the bank always take the chances as a matter of law?" Counsel for defendant: "It does unless its instructions are to the contrary. I do not claim here without instructions we were justified in sending this to Parsons; but what I claim is the instructions were positive to send it to him, and I wish to show that Mr. Tillotson (the cashier of defendant bank) so construed it, and that was his honest intention of the memorandum. Further, we have a letter from the First National Bank of Chicago in which they acknowledge that to be the construction." The Court: "I

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have ruled, in effect, that that memorandum is not susceptible to that construction. You have an exception to that." Counsel: "Your honor holds that that is not an instruction to the Citizens' Savings Bank to send it direct to Parsons?" The Court: "Yes." The defendant bank, not having heard from Parsons, on the 12th of September wrote him to send funds sufficient to meet the certificate. Nothing further was heard from Parsons on the subject. He failed and left the state, and his estate as reported by his son was not worth eight cents on the dollar. The cashier of defendant bank was interrogated further in reference to his good faith in sending the certificate direct to Parsons, and the testimony ruled out. He further testified: "There was no arrangement between our bank and him by which he was authorized, instead of sending currency direct to our bank, to give the bank credit. That would not be allowed any more than we would pay his clerk if he did not have the money to his credit in our bank. I first learned that he was insolvent, or that his credit was not good, on September 15th. On September 7th, when this collection was received from Chicago, Parsons was owing our bank \$4,000." Some considerable correspondence was had between the plaintiff and defendant banks in reference to the matter. On September 21st the plaintiff wrote the defendant as follows: "Chicago, Sept. 21, 1898. Citizens' Savings Bank, Detroit, Michigan.—Gentlemen: We have your favor of the 19th inst. In sending the item to you as we did, we suppose that it was intended to have the advantage of your knowledge of Parsons. We were aware that his was the only bank at Burr Oak, but we thought you would know enough about him not to send to him an item on himself for \$1,650, unless you had and were warranted in having considerable confidence in him. You say nothing on this point. Kindly let us know how you regarded Parsons. Our correspondent in Los Angeles is inquiring sharply of us to see if there is not some responsibility 'somewhere' for this loss. Yours, truly, R. J. Street, Cas. O. P." The defendant replied to this letter as follows:

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"Detroit, Sept. 23rd, '98. R. J. Street, Cashier, Chicago, Ill —Dear Sir: In answer to yours of the 21st inst., regarding the certificate sent to D. F. Parsons, of Burr Oak, who recently failed, I would say that we have had entire confidence in Mr. Parsons' integrity and ability to pay. We had heard nothing detrimental to his financial standing. His rating is from \$30,000 to \$35,000 in Dun's, and we were at the time carrying \$4,000 of loans to him, which was less than the original amount loaned him, and he has always been business-like in his dealings with us. If he had wanted to borrow money, we should have loaned it to him, and we had no intimation whatever that there was anything wrong there. I have requested the assignee to return the certificate, unless he would remit for same. Yours, respectfully, Frank F. Tillotson, Cashier." The certificate was not protested, and the plaintiff bank was not notified of its nonpayment until September 15th. The declaration by which the suit was commenced counts upon the negligence of the defendant bank in sending the certificate to Parsons for collection, and also upon the negligence of defendant in not notifying plaintiff of its noncollection until September 15th; also, for not protesting the certificate for nonpayment. The common counts *in assumpsit* are added. The court directed the jury to return a verdict in favor of the plaintiff for the amount of the certificate and interest. Counsel asked the court to direct the verdict in favor of defendant. This was refused, and the refusal constitutes the principal assignment of error.

The main question in the case, and in fact about the only question, is whether the defendant was justified in sending the certificate directly to Parsons for collection. It is conceded by counsel for defendant that, in the absence of instructions to do so, it is negligence to send the collection directly to the drawer; and such negligence makes the sender liable for any loss resulting. We think this rule is sustained by the authorities: *Bank v. Goodman*, 109 Pa. St. 428; *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill. 100, 7 N. E. 601; *Bank v. Burns*, 12 Colo. 539,

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21 Pac. 714; First Nat. Bank of Evansville *v.* Fourth Nat. Bank of Louisville, 6 C. C. A. 183, 56 Fed. 965. But it is contended that the instructions from plaintiff to defendant were to send the certificate of deposit directly to Parsons for collection; that this is to be gathered from the terms of the letter; that the directions "collect at your best rate of exchange" implies this from the fact that there was no other bank at Burr Oak. We think in this defendant's counsel is correct. Any other mode of collection would not have been in compliance with instructions. The defendant could not send the certificate through the express company, as it could not be collected at the best rate of exchange in that way. The further direction, "Kindly take this ticket off before forwarding to Burr Oak," is consistent only with the idea that the collection was to be sent directly to the Parsons bank. The plaintiff, in its letter forwarding the certificate, calls attention to the fact that the defendant has a correspondent at Burr Oak, and then says: "Please collect at best rate of exchange." Under these circumstances, we think the defendant was justified in so sending the collection, especially as Parsons had a rating with R. G. Dun & Co. of from \$30,000 to \$35,000, and the defendant's officers had entire confidence in him. But, aside from this, it is quite evident from the correspondence following that the plaintiff construed its own letter to mean that defendant was instructed to send the collection direct to Parsons. In the letter of plaintiff of September 16th the inquiry is made: "State whether the item was sent direct to Parsons or through some other agency at Burr Oak." On the 19th the defendant wrote plaintiff that it had been sent direct to Parsons, and on the 21st the letter is written by plaintiff heretofore quoted. In that letter it was said: "In sending the item to you as we did, we suppose that it was intended to have the advantage of your knowledge of Parsons. We were aware that his was the only bank at Burr Oak, but we thought that you would know enough about him not to send to him an item on himself unless you had and were warranted in having considerable

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confidence in him." In other words, it is apparent that the very purpose of the item's being sent to defendant was because it had knowledge of Parsons' responsibility, and that it could be collected by defendant at better rates than plaintiff could collect it for from Chicago. As Parsons had the only bank at Burr Oak, it must have been anticipated by plaintiff that defendant would, if it believed Parsons responsible, send the collection directly to him, and thus obtain the best rates of exchange. No question is made but that the defendant acted in the utmost good faith in believing that Parsons was perfectly responsible. The collection was sent Parsons on the 9th. The 10th, being Saturday, was a half holiday. On Monday, the 12th, the defendant, not having heard from Parsons, made inquiry about the collection, and learned that he had failed. The plaintiff was notified immediately. We think the defendant was not negligent in any particular; and the court below should have directed the verdict in favor of defendant. The judgment must be reversed, and a new trial ordered. The other justices concurred.

RICHARDSON

v.

CONTINENTAL NAT. BANK OF MEMPHIS, TENN.

(Circuit Court of Appeals, Fifth Circuit, May 16, 1899.)

Collections—Construction of Agreement between Banks—Title to Items Uncollected at Time of Failure.—A bank entered into an agreement to "handle" the business of another bank within a specified territory, and pursuant thereto, certain items of exchange were transmitted to it, endorsed payable to the order of any national or state bank, which were credited to the account of the transmitting bank. *Held*, that the receiving bank was not the purchaser of such items of exchange, nor did it become the debtor of the transmitting bank by so crediting the items; and that the latter was entitled to

*See notes at end of case.

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the possession of all such items uncollected at the time of the failure of the receiving bank, or their proceeds, which could be identified in the hands of its receiver.

APPEAL by complainant from the circuit court of the United States for the Eastern District of Louisiana. *Reversed.*

The object of this suit is to recover the proceeds of a large number of checks, drafts, notes, etc.,—generally denominated “items of exchange,”—transmitted between July 31 and August 4, 1896, inclusive, by the appellee, complainant, to the American National Bank for collection. These proceeds, it is averred, were collected after the failure of the insolvent bank, and came into the hands of the receiver, the appellant. This is not a suit claiming any preference on the general assets of the insolvent bank, but simply for recovery of the proceeds of certain items of exchange remitted to said bank, collected after its failure, and turned over to the receiver later, the ownership of which is asserted in this proceeding by the complainant below, appellee here. On August 5, 1896, the American National Bank closed its doors at 3 p. m., and never opened them again for business. The following day, by direction of the comptroller of the currency, Edward I. Johnson, bank examiner, took possession of the books, assets, and property found in the bank. Subsequently the appellant qualified as receiver and took possession of the bank’s property. The only arrangement ever entered into by the complainant and the American National Bank, relative to the course of business between them, is embodied in and based upon the following two telegrams and complainant’s letter, all dated July 31, 1896, to wit:

Telegram.

“Memphis, July 31, 1896.

“To American National Bank, New Orleans, La.: Have mislaid your recent letter. Please write us best terms handle our N. O., La., and So. Miss. business. May decide give you our business immediately.

“C. F. M. Niles, President.”

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Telegram.

"New Orleans, La., July 31, 1896.

"Continental National Bank, Memphis, Tenn.: Telegram received. Will credit cash items on points named, also Texas, at par on receipt. Start the account. We will please you.

American National Bank."

Letter.

"Memphis, Tenn., July 31, 1896.

"American National Bank, New Orleans, La.—Gentlemen: I wired you this morning in regard to handling our account, and have received your wire, which is satisfactory. We will commence sending you our business to-day, and hope you will be able to handle it satisfactorily, and that you will find the account a profitable one. We are obliged to send you a somewhat large item on Baton Rouge, but this will be an exceptional one, at least in amount, and I believe you will find our account a valuable one for your bank. We will endeavor to keep balances with you sufficient to justify any small expense in the collection of some interior items. Hoping that the arrangement we are entering into will prove mutually advantageous, and with best wishes, believe me,

"Yours, very truly, C. F. M. Niles, President."

It is true that the American National Bank wrote a letter on the same date, July 31, 1896, proposing, in effect, a modification of the telegraphic terms; but that letter, at all events, was never acted on by complainant, and it is extremely doubtful whether it ever reached Memphis in time to be considered before the failure of the bank. Accordingly, complainant commenced the same day to transmit to the American National Bank its items of exchange for collection, amounting to \$5,020.88, and this was continued by further remittances of items for collection on August 1st, 3d, and 4th, the 2d of August falling on a Sunday. All letters containing remittances were headed as follows:

"Protest, unless otherwise instructed, and return at once. We enclose for collection and credits.
returns.

"Yours, respectfully, H. L. Armstrong, Cashier."

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All the items contained in these letters were indorsed by a rubber stamp, as follows :

“Pay to the order of
“Any National or State Bank.
“[Date here.]
“Continental National Bank,
“H. L. Armstrong, Cashier.”

This indorsement was for the purpose of vesting the said American National Bank with the necessary authority to receive and collect the same. The items transmitted in these four several letters by complainant apparently reached the bank on August 1, 3, 4, and 5, 1896, respectively, and were by the note clerk, conformably to the usages of that bank, credited to complainant on the books of the bank. Most of the items embraced in the first three letters, drawn on or payable by parties in New Orleans, were collected by the bank. Those items in the first two letters, payable at other points,—out of town items,—were sent by the bank to other banks for collection. All of the out of town items in the last two letters, of date August 3 and 4, 1896, were retained separate by the bank, and passed into the hands of the bank examiner, who took charge of the insolvent bank on August 6, 1896, and collected them through the medium of the Louisiana National Bank of New Orleans, for his account as examiner in charge. Some of the city items in these two letters were kept separate from the funds of the bank, and placed in the hands of the bank's attorney, Mr. George Denegre, on the morning of August 6, 1896 (before the bank examiner took charge), who collected the same, placed the proceeds in sealed envelopes, and indorsed thereon the amounts and the names of the parties for whose account he had so collected them. These identical proceeds, so collected by Mr. Denegre, were by him turned over, in those envelopes intact, to the examiner in charge, who delivered them to the receiver. All of the out of town items, transmitted in the first two of complainant's letters were sent by the bank, before its announced failure, to other banks, its correspondents, for collection; and they

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were by them collected after the failure of the bank, or if, in some few cases, they were collected before the failure, the proceeds were not forwarded to the bank by its subagents prior to the failure. Such collections were remitted to the examiner in charge, mainly, and by him paid over to the receiver, or they were, in a few instances, sent to the receiver directly.

On August 5, 1896, the board of directors of the bank met and adopted the following resolution:

"Special meeting at 8:30 p. m., Wednesday, August 5, 1896. A quorum of directors met at 7:30 p. m. this day. Present: Messrs. Gardes, Keiffer, Renaud, and Dumas. Mr. Gardes stated what had taken place during the day, and that the deposits received during the day had been set aside. The directors approved of this action, and instructed the president to hold the said deposits separate and apart from the banking funds, and to examine carefully the condition of the bank, and report at a meeting to be held at 8:30 a. m., August 6. Duly moved, seconded, and adopted.

"H. Gardes, President."

The answer admits that the bank was hopelessly insolvent on August 5, 1896, but declares that defendant is not fully advised as to knowledge by the managing officers of the financial condition of the bank previously.

On hearing in the circuit court, as shown by the amended record, the following judgment was rendered:

"This cause came on to be heard on the pleadings, exhibits, and evidence adduced, and was argued by counsel. Whereupon, on consideration thereof, the court being satisfied that the relation of principal and agent existed between the complainant and the American National Bank of New Orleans; that said American National Bank was hopelessly insolvent, and that to the knowledge of the managing officers, the president, and cashier of said bank, on or before July 1, 1896; that said American National Bank was guilty of fraud in accepting the collections of the complainant, transmitted in complainant's letters of July 31 and August 1, 3, and 4, 1896:

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that complainant has traced the items of collections therein set forth to the hands of the defendant, the receiver, as aforesaid; that the same had come into the possession of said receiver as follows, to wit:

Items in Exhibit B, annexed to the bill of complaint, aggregating the sum of.....	\$3,100 87
Items in Exhibit D of the bill, amounting to.....	462 81
Items in Exhibit F, amounting to.....	4,359 11
Items in Exhibit F, collected through W. L. Moody & Co., of Galveston, Tex., amounting to.....	326 47
	\$8,249 26

—All of which came into the hands of the receiver, aggregating the sum total of \$8,249.26, constituted, and is a trust fund in the hand of said receiver as trustee, for the complainant; and that complainant is entitled to be paid the same, with interest, out of the funds which came into the hands of the defendant as such receiver. It is therefore ordered, adjudged, and decreed that the complainant have and recover from the defendant, F. L. Richardson, receiver of the American National Bank of New Orleans, the sum of \$8,249.26, with interest at 5 per cent. per annum from the date of the filing of the bill of complaint herein, together with all costs, which is decreed to be paid within 10 days, by priority over all unsecured creditors; and that for the balance of the complainant's claim, to wit, \$5,692.61, complainant be, and is hereby, recognized as a general creditor, and entitled to participate *pro rata* with depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets. And it is ordered, adjudged, and decreed that said defendant, receiver as aforesaid, pay to complainant such *pro rata* thereof as has been or may be paid to other unsecured creditors of said American National Bank.

"February 15, 1899. [Signed] Aleck Boorman, Judge."

F. N. Butler, for appellant.

E. M. Hudson, John D. Rouse and Wm. Grant, for appellee.

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Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts, the opinion of the court was delivered by PARDEE, Circuit Judge.

The questions presented on this appeal are identical with those presented in the case of Richardson v. Banking Co. (just decided) 94 Fed. 442. On the facts as recited there is still less reason in claiming that under the contract between the parties the American National Bank purchased the items forwarded, and that the relation of debtor and creditor ensued as soon as the items were credited on the books of the American National Bank. The correspondence between the parties was plainly and directly about collections only, and the course of business between the parties, so far as it was proved, prior to the failure of the bank, shows the full understanding of the parties that the business to be transacted was that of collection merely. All the items going to make up the sum of \$8,249.26 are fully proven to have been collected subsequently to the failure of the American National Bank, and there is no dispute that the respective amounts thereof came to the hands of the receiver, and were sufficiently identified to show on what claims and for whose account they were collected. The objections as to the allowance of interest and the form of the judgment are allowed, for the reasons given in Richardson v. Banking Co., just decided. There has been much unnecessary trouble to the judges of this court, and probably to the judges in the circuit court, from the neglect of the parties to follow the usual rule in such cases, and have the accounting done contradictorily before a master.

The decree of the circuit court should be reversed, and the cause remanded, with instructions to enter a decree as follows: It is ordered, adjudged, and decreed that the complainant, the Continental National Bank of Memphis, do have and recover from the defendant, Frank L. Richardson, receiver of the American National Bank, the sum of

Notes

\$8,249.26, which said receiver is ordered to pay, out of the funds which have come to his hands as receiver, within 30 days from the signing of this decree, and by priority over all unsecured creditors of the American National Bank, or that he do within said delay certify the same to the comptroller of the currency, with a copy of this decree; and it is further ordered and decreed that for the balance of complainant's claim, to wit, the sum of \$5,602.61, the said Continental National Bank of Memphis be, and is hereby, recognized as a general creditor, entitled to participate *pro rata* with the depositors and other general creditors of said American National Bank of New Orleans in the distribution of its assets; and it is ordered and decreed that the said defendant receiver pay to said Continental National Bank of Memphis, Tenn., such *pro rata* thereon as has been or may be paid to other unsecured creditors of said American National Bank, or do certify the same to the comptroller, to govern his action in the premises.

And it is so ordered.

NOTES.

Title to Paper Indorsed for Collection.—See 1 Banking Cases 296, *note*.

Same—Effect of Crediting as Cash.—See 1 Banking Cases 102, *note*.

Same—Effect of Custom to Credit as Cash.—See 1 Banking Cases 102, *note*.

Collections—Failure of Transmitting Bank—Right to Proceeds of Check.—See 1 Banking Cases 292, *note*.

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ALDRICH, RECEIVER,

v.

CHEMICAL NAT. BANK.

(*Supreme Court of the United States, March 5, 1900.*)

Insolvent National Banks—Loans—Ultra Vires.*—A national bank which has obtained money from another bank under a loan negotiated by the vice president of the national bank, who assumed to represent it in the transaction, and has used the money so obtained in its banking business and for its own benefit, cannot avoid liability to such bank for the money so borrowed, even though the securing of the loan by the national bank itself would have been *ultra vires*.

Same—Dividends—Secured Creditors.†—A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject only to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full.

APPEAL from United States circuit court of appeals, sixth circuit. *Affirmed.*

Messrs. F. W. Oldham and John W. Herron, for appellant.

Messrs. George H. Yeaman, William Worthington, and George C. Kobbe, for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court:

This litigation has extended over many years, and the

*See *Gill v. First Nat. Bank* (Tex. Civ. App.), 1 Banking Cas. 28, and *note*, p. 31.

†See *Merrill v. Nat. Bank of Jacksonville* (U. S.), 1 Banking Cas. 210; *Citizens' Bank of Mound City v. State ex rel. Atty. Gen.* (Kan.), 1 Banking Cas. 85, and *note*, p. 88.

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case as now presented will be best understood if a statement be made showing the proceedings in the circuit court and circuit court of appeals. Case Stated.

In its bill in this case the Chemical National Bank alleged that on the 2d day of March, 1887, it loaned to the Fidelity National Bank the sum of \$300,000 which the latter bank promised to repay on demand with interest from the date of the loan, and at the same time delivered as collateral security therefor a certificate of deposit for the above amount together with sundry promissory notes.

The certificate referred to was in the following form :

Certificate of Deposit.

This certificate is not subject to check, but must be presented to draw the money.

No. 345.

The Fidelity National Bank.

Cincinnati, Feb. 28, 1887.

E. L. Harper has deposited in this bank three hundred thousand dollars (\$300,000), payable to the order of himself on return of this certificate in current funds. \$300,000.

Ammi Baldwin,

Cashier.

Indorsed: "E. L. Harper."

It was alleged that the signature of Baldwin as cashier was used as the signature of the bank by its authority.

The bill then stated that on May 21st, 1887, the Chemical Bank at the request of the Fidelity Bank returned some of the notes delivered as collateral security, and received in substitution therefor other notes. The latter notes were described in a schedule attached to the bill, and it was alleged that the bank was still the owner and holder of them, except three executed by J. W. Wilshire for \$25,000 each, which had been paid at maturity by John V. Lewis, the indorser thereof, the money so paid being held in lieu of the notes delivered as collateral security for the loan.

After setting forth the appointment on the 21st day of June, 1887, of Armstrong as receiver of the Fidelity Bank,

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as well as the subsequent proceedings by which on the 12th day of July, 1887, that corporation was dissolved, the bill alleged that the Fidelity Bank never repaid the loan nor any part thereof; that the Chemical Bank presented to the receiver proof of its claim, and requested him to submit it to the Comptroller of the Currency in order that a dividend might be paid to it from the assets of the bank equal in ratio to the dividends paid to other creditors, and that it might thereafter receive further dividends until its claim was paid; but that the Comptroller and the receiver had refused to allow it to be enrolled as a creditor.

The receiver, without explicitly responding to the allegations of the bill as to the making of the loan, said that he was unable to state whether or not the plaintiff loaned to the Fidelity Bank the sum of \$300,000. In an amended answer he specifically denied that the Chemical Bank loaned to the Fidelity Bank the sum named, or that any such loan was made by the former to the latter on the faith and credit of the alleged certificate of deposit, or that such certificate was executed and delivered by the cashier of the Fidelity Bank as its act and by its authority.

The answer averred that on the 2d day of March, 1887, and prior thereto, Harper was the vice president of the Fidelity Bank, and engaged in speculations in which he used its funds; that in the use of those funds he was assisted by Baldwin, but that such use was not known to the other directors of the bank, was not authorized by it, and was a fraudulent and illegal appropriation of its funds for the personal use of Harper; that a paper was signed by Baldwin, as cashier of the Fidelity Bank, which was believed to be the same paper alleged to be a certificate of deposit of the Fidelity Bank; that such certificate was not entered upon the books of the bank, nor taken from the book from which, if regular, it should have been taken; that its execution was unknown to the other officers of the bank, and was unauthorized by it; and that no consideration was received for it by the Fidelity Bank from Harper, or from any other person,

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nor was money deposited in the bank as the basis of the certificate.

Continuing, the defendant averred that the certificate of deposit and the promissory notes described in the bill were forwarded to the Chemical Bank by Harper, and the sum of \$300,000 was received by him from that bank; that he represented to the officers of the Fidelity Bank that the money was received from a loan made to him, and by him, and by his direction was credited on his personal account, and was thereupon drawn out and used for his individual purposes, and that the other officers of the bank had no knowledge that the facts were otherwise than as represented by him. It was also averred that a large portion of the promissory notes delivered as collateral security for the loan was the personal property of Harper in which the Fidelity Bank had no interest.

The answer after reciting the fact of the payment by the indorser Lewis of the three notes made by Wilshire for \$25,000 each, alleged that the fourth note of Wilshire for the same amount, also indorsed by Lewis, was not presented for payment by plaintiff at maturity, in consequence whereof that note was not paid and the indorser was discharged. It was also averred that the Chemical Bank credited the payment of the above three sums of \$25,000 upon the alleged loan of \$300,000, reporting the same to the defendant as payments on that account, and treated them in all respects as proper credits on such loan. Payment of certain other notes since the bringing of the action was also alleged to have been made to the Chemical Bank.

The defendant therefore claimed that the Fidelity Bank was not liable to the Chemical Bank for the amount of the loan, but if it were otherwise adjudged, the defendant asked that all payments made to the plaintiff upon the collateral paper forwarded by Harper as security for the loan should be credited thereon; that the above note of Wilshire, indorsed by Lewis, not having been paid in consequence of plaintiff's

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neglect to present the same for payment, should be also credited; that the balance of the collateral paper should first be exhausted and the proceeds credited; and that the plaintiff should be permitted to prove only the amount found due after such credits had been made.

To the answer as amended the plaintiff filed a general replication.

In deciding the case the circuit court, among other things, said: "Conceding that the transaction of \$300,000 loan was fraudulent as between E. L. Harper and the Fidelity Bank, and that he appropriated the entire proceeds to his individual use, the claim of the Chemical Bank, which dealt in good faith in the transaction, and was innocent of any knowledge or participation in the fraud, is not affected thereby. The negotiation of the loan was within the authority of Harper as vice president of the Fidelity Bank, and if he used that authority fraudulently for his own advantage, the bank that enabled him to commit the fraud must suffer from the consequences, and not the bank that made the loan and advanced the money, under the representation and in the belief that it was conducting a fair, legitimate business transaction with the Fidelity Bank." But the court held that all collections made prior to the filing of the claim upon the collaterals held by the Chemical Bank as security for the loan should be deducted therefrom. 50 Fed. Rep. 798, 802.

From this decision both parties appealed to the circuit court of appeals. That court reversed the decree, holding upon an extended review by JUDGE TAFT of the adjudged cases that creditors of an insolvent national bank could not be required *in proving their claims*, to allow credit for any collections made after the declared insolvency of the bank from collateral securities held by them. 16 U. S. App. 465, 59 Fed. Rep. 372, 8 C. C. A. 155, 28 L. R. A. 231.

The Chemical Bank filed a petition for rehearing upon the ground that the court had erred in fixing the amount of interest to be allowed the bank on the dividends declared.

While that petition was under consideration by the circuit

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court of appeals, this court decided the case of *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470, 14 Sup. Ct. Rep. 572, which related to a transaction between that bank and Harper. Thereupon the receiver filed a petition for rehearing, upon the question as to the validity of the loan involved in the present suit.

The above petitions for rehearing having been granted, the cause was again heard in the circuit court of appeals, and it was there decided that under the special facts disclosed by the evidence, and in view of the decision in *Western Nat. Bank v. Armstrong*, the parties should be allowed an opportunity to introduce further evidence "upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the loan." The former order of the court was therefore modified, and the decree of the circuit court was reversed and the cause remanded, with leave to the parties to adduce such additional evidence. 31 U. S. App. 75, 83, 65 Fed. Rep. 573, 577, 13 C. C. A., 47, 28 L. R. A. 239.

The cause was again heard in the circuit court, which said: "Upon the evidence, the finding of this court is that the power of the Fidelity to borrow money by conducting such a transaction as is involved in this case is established, and that the same is legitimately within the business of banking under the national bank act." It found for the Chemical Bank on the issue defined in the mandate of the appellate court. 76 Fed. Rep. 339, 345, 347. The decree was in these words: "And the court being now fully advised, finds that the Fidelity National Bank upon the second day of March, 1887, borrowed from the complainant the sum of \$300,000, and that on the 21st day of June, 1887, when the Fidelity National Bank was declared insolvent, there was due from the Fidelity National Bank to the complainant the said sum of \$305,450; that dividends have been declared from the assets of the Fidelity National Bank to the creditors thereof at the dates and for the rates per centum, as follows, that is to say: October 31st, 1887, the first dividend of 25 per centum; June 15th, 1889, the second dividend of 10 per cen-

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tum; June 30th, 1890, the third dividend of 10 per centum; August 5th, 1891, the fourth dividend of 5 per centum; August 15th, 1894, the fifth dividend of 8 per centum. The court further finds that upon the 25th day of April, 1890, the defendant rejected the claim aforesaid of the complainant, which had been theretofore presented to him; and that after the previous decree of this court upon, to wit, the 25th day of July, 1892, said defendant paid to said complainant the sum of \$100,000 upon account of the sum which might be due to the complainant pursuant to the provisions or that purpose made in the decree of this court, entered in this cause on the 8th day of July, 1892. The court finds that there is now due this 21st day of October, 1896, to the complainant from the defendant the sum of \$117,749.78, being the dividends aggregating 58 per centum heretofore declared from the assets of the Fidelity National Bank, computed upon the amount of the complainant's claim as herein allowed, with interest on those of said dividends which were declared prior to April 25th, 1890, from said last-named day, and with interest upon those hereafter declared from the dates of their declaration, respectively, after crediting the said payment of \$100,000, upon the 25th day of July, 1892, the computation being made upon the principle ordinarily applied in partial payments. It is therefore ordered, adjudged, and decreed that the defendant pay to the complainant the said sum of \$117,749.78, with interest thereon from said 21st day of October, 1896, and that hereafter, while any balance remains due the complainant upon said loan, said defendant pay to complainant dividends, calculated upon said sum of \$305,450, like to those paid to other creditors of the Fidelity National Bank."

The receiver appealed from this decree, and the circuit court of appeals affirmed the decree of the court below. The opinion of that court states fully the grounds upon which it held the case not to come within the rule announced in *Western National Bank v. Armstrong*, 54 U. S. App. 462, 83 Fed. Rep. 556, 27 C. C. A. 601.

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From that decree the receiver has appealed to this court—the present appellant having succeeded Armstrong.

The principal contention of the appellant is that under the principles announced in *Western National Bank v. Armstrong* the Fidelity National Bank incurred no liability on account of the money obtained from the Chemical National Bank. But the appellee insists that the language of this court in that case, so far as it relates to the power of a national bank as incidental to its business to borrow money was much broader than was necessary for the determination of the issues then before the court, and, if interpreted as is done by the appellant, is in conflict with the adjudged cases, inconsistent with sound principle, and should be modified.

In the last-named case the Western National Bank of New York alleged that the Fidelity Bank was indebted to it on account of a loan made May 28th, 1887, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf," and which loan, it was further alleged, was secured by collateral, signed by one Gahr and indorsed by Harper, and by the indorsement and delivery to the Western Bank by Harper, of certificates for 1,600 shares of the capital stock of the Fidelity Bank. It was also alleged that the collateral was without value, and that the stock was wholly invalid and void. The Fidelity Bank denied that the Western Bank made any loan to it, or that it had any connection with or interest in the transaction referred to in the bill. The pleadings and evidence raised the question whether Harper, in his transactions with the New York bank, could legally bind the Fidelity Bank of which he was vice president. This court said: "It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio Bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown

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that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice president and managing officer, and that by 'managing officer' he meant that Harper was 'the general manager of the business of the bank.' No such officer as that of 'general manager' is known or named in the national bank acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the 8th section of the national bank act (Rev. Stat. § 5136, ¶ 7): A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business

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of the bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 127, 23 L. Ed. 679, 681, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow \$200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the lender cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown."

In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate

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the loan. If the present case depended upon that question it might be necessary to consider whether the language in *Western Nat. Bank v. Armstrong* required modification.

It may be well, however, to observe that this court, in *Auten v. United States Nat. Bank*, 174 U. S. 125, 141, 143, 43 L. Ed. 920, 926, 927, 19 Sup. Ct. Rep. 628, 635, held that the borrowing of money was not out of the usual course of banking business. We said: "A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities." It is important also to observe that the court said that *Western Nat. Bank v. Armstrong* was not to be regarded as an adjudication to the contrary.

We may further observe that the last named case differs from the present case in many important particulars.

In *Western Nat. Bank v. Armstrong* the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice president. This court took care in that case to say that it did "not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In the present case it appears that the following letter, under date of February 28th, 1887, and signed by E. L. Harper as vice president of the Fidelity Bank, was addressed to the cashier of the Chemical Bank: "Enclosed herewith we hand you for credit our certificate of deposit No. 345 for \$300,000, with bills as collateral, as follows: [Here was given a list of twenty-seven notes.] We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit and advise the rate." This letter having been received by the Chemical Bank, its cashier wrote to the cashier of the Fidelity Bank under date of March

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2, 1887 : "Your favor of the 28th inst. has been received. We credit Fidelity National Bank \$300,000, and shall be considerate as to the rate of interest when the loan is paid." Before this last letter could have reached Cincinnati the bookkeeper of the Fidelity Bank, acting under instructions from Harper, credited him personally on the books of that bank with \$300,000. But the credit of \$300,000 given to the Fidelity Bank on the books of the Chemical Bank remained unaltered, and that amount was drawn from the latter bank in the ordinary course of business on the authorized checks of the Fidelity Bank and went to discharge its legal obligations. And it may be added that the Fidelity Bank had notice of the above credit in its favor; for, besides other evidence, it was shown that in the monthly statement sent by the Chemical Bank to the Fidelity Bank covering the transactions of March, 1887, there appeared under the date of March 2d a credit to the Fidelity Bank as follows: "Tem. loan, \$300,000."

We have then a case in which a national bank having used in its business money which its vice president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained? This question is recognized by the court as one of great importance, and has received careful consideration in the light of the adjudged cases. We proceed to the examination of those cases.

In *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 644, 19 L. Ed. 1008, 1028, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and

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received, whatever may have been the defect in the authority of the cashier to make the purchase.

In *Marsh v. Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040, 1043, it was held that "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In *United States v. State Nat. Bank*, 96 U. S. 30, 36, 24 L. Ed. 647, 648, which were actions brought in the court of claims against the United States to recover the amount of certain gold certificates deposited in the subtreasury at Boston and forwarded, after being cancelled, to the treasurer of the United States, and in which transactions fraud was imputed to the cashier of the subtreasury at Boston, this court said: "In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved. . . . Surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal.

The rule was illustrated in *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, which was an action against a municipal corporation to compel it to repay money received and paid into its treasury on account of bonds sold by it, but which it had issued without authority of law. This court held that the law implied from what was done a contract that the city would return the money paid to it my mistake. To the

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same effect is *Chapman v. Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378, 381, 2 Sup. Ct. Rep. 62 *et seq.*

In *Parkersburg v. Brown*, 106 U. S. 487, 503, 27 L. Ed. 238, 245, 1 Sup. Ct. Rep. 442, it appeared that the city of Parkersburg, West Virginia, pursuant to an act of the legislature of that state, issued its bonds to be loaned to persons engaged in manufacturing and to be secured by deed of trust or mortgage on real estate. The bonds were held to be void under the principles announced in *Citizens' Sav. & Loan Asso. v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, and the question arose whether the city was bound to account for the property conveyed to it in trust to secure bonds so issued and loaned to persons engaged in manufacturing. This court said: "Notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received. *White v. Franklin Bank*, 22 Pick. 181; *Morville v. American Tract Soc.*, 123 Mass. 129, 25 Am. Rep. 40; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 275, 41 Am. Rep. 221, and cases there cited."

In *Read v. Plattsmouth*, 107 U. S. 568, 575, 27 L. Ed. 414, 417, 2 Sup. Ct. Rep. 208, 214, where the question was as to the validity of bonds issued by a municipal corporation, the court said: "In the present case the statute in question

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does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over \$15,000, were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a schoolhouse on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used immediately arose."

A case aptly illustrating the principle adverted to is *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 74, 78, 35 L. Ed. 107, 110, 112, 11 Sup. Ct. Rep. 496, 499, 500. The facts in that case were these: *Townsend*, it was alleged, sold to the Logan County National Bank, through its cashier, bonds of a railroad corporation in consideration of a named sum and the agreement of the bank that it would, upon his demand, replace the bonds to him at the same price or less. The bank refused to comply with the agreement to replace the bonds, and *Townsend* sued to recover from it the damages sustained by him, to wit, the difference between the price paid by the bank and the value of the bonds. The bank, in its defense, denied that it had any connection with the transaction between *Townsend* and its cashier otherwise than that the latter having deposited the proceeds in the bank it had paid them to the plaintiff. Its principal defense was that the cashier as such had no authority to make the contract set out, and that the defendant had itself no right, power, or authority to make it. Taking it to be true, as found by the jury, that the alleged agreement was made by the cashier for the bank, and not upon his individual account, and assuming from the record that the bank held the bonds at the time *Townsend* sued, this court said: "If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff on demand, the question would still remain whether, notwithstanding the act of Congress

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defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or less price. It would seem, upon defendant's theory of its powers, to be too clear to admit of dispute that the act of Congress does not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without authority to make. True, it is not under a duty to surrender possession until reimbursed the full amount due it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power under the statute to make such a contract of purchase may be pleaded in bar of all claims against it based upon the contract,—and we are assuming, for the purposes of this case, that it may be—it is bound upon demand, accompanied by a tender back of the price paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. Again: "Our conclusion upon the whole case, so far as the questions arising in it may be reviewed by this court, is, that if the bank had no authority to purchase the bonds in question, it is yet not exempt, by reason of anything in the national banking act, from liability to the plaintiff for the difference between the price it paid for them and their value at the time it refused, upon plaintiff's

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demand, to comply with the contract made by it for their purchase and held onto the bonds."

In *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 35 L. Ed. 55, 68, 11 Sup. Ct. Rep. 478, 488, which involved the validity of a certain contract whereby one corporation leased and transferred all its cars, contract rights, and personal property to another corporation, and which lease was held to be void, this court said: "A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creating, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." This principle was recognized and enforced in *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 151, 43 L. Ed. 108, 114, 18 Sup. Ct. Rep. 808, 813, in which it was said: "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

In *Ditney v. Dominion Nat. Bank*, 43 U. S. App. 613, 615, 75 Fed. Rep. 769, 771, 22 C. C. A. 376, 377, which was an action against a receiver of a national bank to recover the amount of a loan made by its president without the knowledge of the directors and for which he gave the note of the bank,—the object of the transaction being to cover up certain frauds of the president,—the court, speaking by JUDGE TAFT, said: "In our opinion, even if the president may not have had authority to effect the loan, yet when he,

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in order to conceal his previous embezzlement, deposited the sum to the credit of the Citizens' Bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman as its president had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion Bank. We think the same principle applicable in this case which was applied in the case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the annual settlement of one company he drew checks of the other and deposited them to the credit of the one company in bank. The question was whether the company whose bank account had been swelled by the checks of the other was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take and hold it with the burden of his knowledge. So in this case the bank, having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do not see that the circumstance in one case that the treasurer stole the money, and in the other that the president obtained it on the false representation that he was authorized to borrow it for his bank makes any reasonable distinction between the two cases."

In *Perkins v. Boothby*, 71 Me. 91, 97, the question was as to the liability of a joint-stock company on account of notes given by its agent for money loaned and which was appropriated to the payment of the company's debts. The directors had no knowledge of the loan or the appropriation of the

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money, unless knowledge could be implied from the fact that those acts were done by the agent. The defense was that the agent's want of authority to effect the loan relieved the company from responsibility, not only on the notes, but for any claim under the common counts for money had and received. After observing that although the directors upon receiving notice of the acts of the agent in terms repudiated them, yet after knowledge of the facts retained the benefit of the loans effected and used the money in discharge of valid claims against the company which would have been in force except for the unauthorized acts of the agent, the court said: "'If liable in one case why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which have come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.' Green's Brice's *Ultra Vires*, 618. The question whether, upon reason and authority, the application of this principle should be extended to municipal corporations, or whether, on the contrary, the purposes for which such bodies are organized, the limited powers conferred upon them, as well as considerations of public policy and safety, may remove them from such liability, is one of great importance. It does not arise in this case."

In *Bank of Lakin v. National Bank*, 57 Kan. 183, 45 Pac. 587, a bank was held liable for the amount of certain notes executed in its name by its cashier without its authority, but the proceeds of which were received by the bank, the court saying that "a principal cannot receive the benefits of a transaction and at the same time deny the authority of the agent by whom it was consummated."

Without further citation of cases we adjudge, both upon

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principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money. When, as the result of its arrangement with Harper as vice president, the Chemical Bank credited the Fidelity Bank on its books with the sum of \$300,000 the former thereby undertook to pay the checks of the latter to the extent of that credit. And, as already stated, that credit was fully exhausted by the payment of the checks of the Fidelity Bank drawn in the ordinary course of its business. If the latter bank in this way used the money obtained from the Chemical Bank, it is under an implied obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. Suppose the Fidelity Bank by its check upon the Chemical Bank had drawn the whole \$300,000 at one time, and now had the money in its possession unused? It would not be allowed to hold the money, even if it were without power under its charter to have borrowed it from the Chemical Bank for use in its business. Or suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money

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Loans—Ultra
Vires.

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on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit money obtained by one of its officers from another bank under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have directly borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing. If the Fidelity Bank did not itself borrow this money from the Chemical Bank, although the latter bank in good faith believed that it did, then the crediting of the former on the books of the latter with \$300,000 was a mistake of which the Fidelity Bank was not entitled in equity and good conscience to take advantage, and from which it should not be permitted to deprive profit to the prejudice of the other bank. So, if the Fidelity Bank took the benefit of that credit with knowledge of all the facts, then its defense is without excuse and immoral. If it innocently availed itself of that credit without knowledge of the facts, the principles of natural justice demand that it be held accountable for the money of another bank which it used in its business without giving any consideration therefor.

The fact that after the Fidelity Bank had been credited on the books of the Chemical Bank with the \$300,000 Harper fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank had no connection, and cannot affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank, and was by it used in meeting its current obligations. The dishonesty of Harper in his management of the affairs of the Fidelity Bank did not discharge that bank from the obligation under which it came

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by using in its business the money obtained by its vice president under the guise of a loan to the bank.

It is no defense to the claim of the Chemical Bank to say that the directors of the Fidelity Bank were unaware of the fraudulent acts of Harper. We do not rest our conclusion in the present case upon any question as to diligence or want of diligence upon the part of directors. We rest it upon the fact, and the implied obligation arising therefrom, that the Fidelity Bank used in its business and for its benefit the money which the Chemical Bank placed to its credit in consequence of a loan negotiated by Harper who assumed to represent it.

Independently, therefore, of any question as to the scope of the power of a national bank to borrow money to be used in its business, we hold that the Fidelity Bank became liable to the Chemical Bank by using the money obtained from the latter, under the arrangement made by Harper in his capacity as vice president; consequently, the decree recognizing the claim of the Chemical Bank for the amount of the loan of March, 1887, was right.

2. It is assigned for error that the collections from collaterals securing the alleged loan prior to the declaration of dividends by the receiver were not deducted from the amount of such loan in determining the sum upon which dividends should be paid to the Chemical Bank, and that the Chemical Bank was not required first to exhaust its collateral security and apply the proceeds on its claim before proving it against the receiver for dividends.

Same—Divi-
dends—Secured
Creditors.

This assignment of error was prepared by counsel prior to the decision of this court in *Merrill v. National Bank*, 173 U. S. 131, 135, 146, 147, 1 Banking Cases 210, 43 L. Ed. 640, 642, 646, 19 Sup. Ct. Rep. 360, 366, 367, in which case this court said that the inquiry on the merits was whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either

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his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full. It was held that in the distribution of insolvent estates, "the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require. . . . When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material, insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited."

3. It is also insisted that the Chemical Bank should have been required to deduct from its claim the amount, principal and interest, of the note for \$25,000 indorsed by J. V. Lewis, who, it is alleged, was released because of its failure to take the steps required by the rules of commercial law in order to charge him as indorser. Upon this point the circuit court of appeals, upon the first hearing of this case, said: "Our conclusion upon this main question in the case makes it unnecessary for us to consider the other questions discussed by counsel, which were material only in view of the position taken by the court below on the issue just considered. If the Chemical Bank should receive from dividends and collections payment of debt, principal and interest, now owing to it by the Fidelity Bank, the question would arise whether

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it could not properly be charged with the note for \$25,000 which, through negligence, it failed to collect. It is quite clear, however, that dividends declared and to be declared, together with all collections from collateral, including as such the note just referred to, will fall far short of paying the \$300,000 and interest due the Chemical Bank on the original debt. The question suggested, therefore, does not arise on the facts of the case." 16 U. S. App. 465, 539, 59 Fed. Rep. 372, 382, 8 C. C. A. 155, 165, 28 L. R. A. 231, 238. We concur in that view.

Having noticed all the questions that require consideration, *the decree below is affirmed.*

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v.

DENT, RECEIVER.

(*Supreme Court of the United States, Feb. 26, 1900.*)

National Banks—Stock Assessments—Death of Shareholder—Survival of Liability.—Allottees, to whom there has been an allotment of national bank stock in indivision, in proportion to their interest in the estate, are liable, under U. S. Rev. Stat., sections 5139, 5151, 5152, etc., to assessments upon such stock, although it is registered on the books of the bank in the name of the intestate, the bank not having been notified of the allotment, upon the subsequent insolvency of the bank.

Same—Same—Same—Enforcement against One of Several Allottees.—Although the whole amount of an assessment on such shares of stock is enforced, pursuant to a state statute, against one of such allottees, to the extent of the distributive share of the estate received by him, he is not entitled to complain, under the federal statute providing that each stockholder in a national bank can only be liable to the extent of the amount of his stock therein, etc.

ERROR by defendants to the State of Minnesota supreme court. *Affirmed.*

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Statement by MR. JUSTICE WHITE :

On October 31, 1864, Sumner W. Matteson became the owner of ten shares of capital stock of the First National Bank of Decorah, established in the city of Decorah, state of Iowa, and the shares were duly registered on the books of the bank in his name. In July, 1895, Matteson, whilst the stock was yet owned by him and still stood registered in his name, died intestate at St. Paul, Minnesota, where he resided, leaving surviving his widow and six children, two of whom were minors. The probate court of Minnesota having jurisdiction over his estate appointed an administrator, who filed an inventory in which was embraced the shares of stock in question. In September, 1896, a final account having been previously filed by the administrator, a decree turning over the estate, including the ten shares of stock, was entered. Under this decree the widow and heirs took the ten shares of stock in indivision in proportion to their interest in the estate ; that is to say, the widow became the owner of an undivided third interest in the stock and each of the children, there being six, of a one-ninth interest therein, thus the widow owned three-ninths of the ten shares and each of the six children one-ninth. No notice of the death of Matteson or of the allotment in question was conveyed to the bank, nor was any transfer of the stock on the books of the bank operated at the time of the allotment or subsequent thereto. Indeed, under the proportions of undivided ownership of the stock in the widow and heirs, it was impossible to have registered on the books of the bank in the name of each owner separately according to their respective ownership in the ten shares without some further partition of the undivided ownership existing between them. It follows that the stock which stood on the books of the bank in the name of Matteson during his life continued to so stand after his death, so remained at the time of the allotment, and was so registered at the time this suit was brought. On November the 10th, 1896, the bank became insolvent and was closed by the comptroller of the currency, who on the 24th of Novem-

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ber, 1896, appointed a receiver. In January, 1897, in order to pay the debts of the bank, under the authority conferred on him by law (Rev. Stat. 5151), the comptroller made an assessment upon the shareholders of \$100 upon each share, and proceedings for its enforcement were by him directed to be taken. The assessment not having been paid, although due notice was given to do so, the receiver sued in the state court of Ramsey county, Minnesota, the widow and children of Matteson, as next of kin, asking judgment for the amount of said assessment. The suit was in conformity to the General Statutes of 1894 of Minnesota, which, in §§ 5918 *et seq.*, permitted an action to be brought against all or one of more of the next of kin of a deceased person, by the creditor of an estate, to recover the distributive shares received out of such estate, or so much thereof as might be necessary to satisfy a debt of the intestate or of his estate. Service was had only upon the widow and one of the children. A general demurrer to the complaint was filed and overruled, and the order so overruling the demurrer was, upon appeal, affirmed by the supreme court of the state. 70 Minn. 519, 73 N. W. 416. Thereafter the demurring defendants answered, setting forth in substance their nonliability to pay said assessment under the statutes of the United States governing the winding up of insolvent national banking associations. A motion for judgment upon the pleadings was thereupon made and granted, and judgment was entered in favor of the receiver against Louise M. Matteson and Charles D. Matteson, and each of them, in the sum of \$1,000 with interest and costs. On appeal to the supreme court of the state of Minnesota, that court affirmed the judgment. 73 Minn. 170, 75 N. W. 1041. A writ of error was allowed, and the judgment of affirmance is now here for review.

Messrs. Edmund S. Durment and Albert R. Moore, for plaintiffs in error.

Messrs. Frank B. Kellogg, Daniel W. Lawler, George R. O'Reilly, and Fitzhugh Burns, for defendant in error.

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MR. JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court :

The questions arising on this record involve a consideration of §§ 5918 *et seq.* of the General Statutes of the state of Minnesota and of the sections of the Revised Statutes of the United States, which are in the margin.†

Leaving out of view for the moment the legal effect of the allotment of the ten shares of stock to the next of kin of

†Sec. 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares ; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Sec. 5151. The shareholders of every national banking association shall be held individually responsible equally, and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares : except that shareholders of any banking association now existing under state laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares ; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title ; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good ; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders ; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

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Matteson, let us consider what, if any, liability rested upon his estate to pay the assessment on the ten shares of stock which stood at his death in his name, and so remained up to the time of the allotment. Because the insolvency of the bank took place after the death of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders to contribute to pay debts ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder. The principle controlling the subject was quite clearly stated by SHIPMAN, J., in *Davis v. Weed*, 44 Conn. 569, Fed. Cas. No. 3,658. There, stock of a national bank stood in the name of a person who died in January, 1871. Nearly one year afterwards, on December 12, 1871, the bank became insolvent, and more than five years thereafter several assessments were made by order of the comptroller of the currency, and an action was instituted against the administrator to enforce payment. Two defenses were interposed by the administrator, as follows: 1, that the estate of the decedent had been settled according to law, prior to the assessments, and that as there were no assets in the hands of the administrator at the time of the demand, and

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he had fully administered the estate and had received no assets since the demand, no judgment could be rendered against him; and, 2, that inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liability, if any, was against the administrator, who, by § 5152 of the Revised Statutes, was freed from personal liability, and was only liable to the extent of the trust estate and funds in his hands at the time of the demand.

The first contention was held untenable, upon a consideration of the statutes of Connecticut in regard to the settlement of estates, and the presentation, allowance, and payment of claims against the estates of solvent deceased persons. In disposing of the second contention the court said:

“The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud.”

The question was settled in *Richmond v. Irons*, 121 U. S.

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27, 30 L. Ed. 864, 7 Sup. Ct. Rep. 788, where the court said (pp. 55, 56, L. Ed. p. 873, Sup. Ct. Rep. p. 801):

"Under that [the national banking] act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966, 3 Sup. Ct. Rep. 263; *Hobart v. Johnson*, 19 Blatchf. 359. In Massachusetts it was held, in *Grew v. Breed*, 10 Met. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity."

And a similar determination as to the nature of a responsibility like the one in question has been arrived at by state courts in decisions on kindred statutes, and, indeed, its correctness is not controverted by any authority to which we have been referred or which we have been able to examine. The accepted doctrine finds nowhere a more lucid statement than in the courts of New York. Thus, in *Bailey v. Hollister*, 26 N. Y. 112, judgment having been recovered against a manufacturing company upon indebtedness which arose in the years 1849, 1850, 1851, 1852, and 1853, an action was brought, after return of execution unsatisfied, to recover the same debt from the personal representatives of the estate of one Kirkpatrick, on the ground that when such indebtedness was contracted the estate of Kirkpatrick was a stockholder, and, as such, personally liable under the charter of the company. Kirkpatrick had died intestate in 1832, and the stock

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stood on the books of the company in his name until 1844, when it was entered in a new stock ledger in the name of the estate, which thereafter received dividends. The facts of this transfer and the payment of dividends were not, however, in the opinion of the court treated as material factors in the decision. The court, in an opinion delivered by GOULD, J., said (p. 116) :

“It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds, not from any new contract made by or on behalf of the estate, but it is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives, as it bound him, as long as the relation of stockholder existed.”

And it may be added, the law presumes, in the absence of express words, that the parties to a contract intend to bind, not only themselves, but their personal representatives. *Kernochan v. Murray*, 111 N. Y. 300, 2 L. R. A. 183, 18 N. E. 868.

The doctrine enunciated in *Bailey v. Hollister*, as above stated, was later applied in *Cochran v. Wiechers*, 119 N. Y. 399, 403, *sub nom.* *Cochran v. Matthiessen*, 7 L. R. A. 553, 23 N. E. 803, where the court held that liability imposed by statute upon stockholders in limited liability companies to respond for the debts of the company, “to an amount equal to the amount of stock held by them respectively,” was in the nature of a contract obligation which survived the death of the stockholder. The court, after approvingly quoting a

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portion of the opinion of GOULD, J., above excerpted, added (p. 404, L. R. A. p. 555, N. E. p. 805):

“The liability of the estate of the deceased stockholder under the statute is so well established, upon principle and authority, that further discussion is unnecessary. Chase v. Lord, 77 N. Y. 1; Flash v. Conn, 109 U. S. 371, 27 L. Ed. 966, 3 Sup. Ct. Rep. 263; Richmond v. Irons, 121 U. S. 27, 30 L. Ed. 864, 7 Sup. Ct. Rep. 788.”

The debt then being one due by the estate of Matteson, if the allotment of the shares in indivision be not considered, the question then is, Taking the allotment into view, what was its effect? The argument is that the next of kin to whom the allotment was made can only be held responsible to the extent of the interest which they took in the stock, and therefore there was error committed in enforcing the whole amount of assessment against the next of kin who were served, to the extent of the distributive share of the property of the estate received by them. But this contention directly conflicts with the interpretation of the statutes of Minnesota by the court of last resort of that state in this case. It is clear that, by necessary implication, it was decided that by the statutes of Minnesota under which the allotment in indivision was made, the heirs or next of kin remained, by operation of law, to the extent to which they received the property of the estate, subject to be sued and to respond to the debts of the estate existing at the time the allotment took place. But the rights arising from the allotment, under the statutes of Minnesota, cannot be greater than those which the statutes in question conferred. The contention, therefore, amounts to this, that in so far as the statutes of Minnesota operated in favor of the participants in the allotment the statutes are to be respected, but to the extent that they imposed obligations upon the allottees they are not bound thereby. It is argued, however, that as by law of Minnesota the liability to be called upon to pay a debt of the estate, to the extent of the distributive share received, depended solely upon whether there was such debt existing at the time the

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allotment was made, and as there was no such debt in the present instance, no duty to respond arose. This is predicated upon the assumption that because the insolvency happened after the allotment, therefore there was no debt at the time of the allotment. This assumes that whether there was a debt depended upon the date of the insolvency. In effect, this is but to argue that the estate was never liable at all. Such, clearly, is the essence of the proposition, for if it be that whether there was a debt is to be alone ascertained by the happening of insolvency, and not by referring to the date of the subscription, then where insolvency occurred after the death of the stockholder there would be no responsibility. The unsoundness of this view has been already demonstrated. Moreover, the supreme court of Minnesota, in effect, in this case, has held that the statute of that state making the allottees liable, each to the amount of their distributive share, for the debt of the estate, embraced a contract liability to pay an assessment contingent on the happening of insolvency, although that event had not taken place at the time of the allotment.

The contention is next made that conceding there was a debt of the estate, and granting that the statute embraced a pre-existing contract obligation which had not ripened into an actual demand because insolvency had not taken place, nevertheless the court below erred, because by the effect of the allotment the estate had ceased to exist and all its property had passed to the allottees. This but reiterates the misconception already disposed of. Whether the effect of the allotment was to extinguish the estate was wholly dependent on the Minnesota law. That law, as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract, and liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question.

These considerations would dispose of the case, since they

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demonstrate that no substantial Federal question was involved but for the fact that it is claimed that as under the statute of the United States each stockholder in a national bank can only be liable to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, therefore the enforcement of the liability for the whole amount against one of the allottees deprives him of the benefit of the Federal statute and involves a misconstruction of its provisions. This contention was considered and adversely decided below. It is conceded that no notice of the allotment was ever given to the bank, and that the stock in question was never registered in the name of the allottees. But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association—that is, the one in whose name stock stands on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. Ed. 478, 4 Sup. Ct. Rep. 525; and *Richmond v. Irons*, 121 U. S. 27, 58, 30 L. Ed. 864, 874, 7 Sup. Ct. Rep. 788. This principle thus settled as to the stockholders in national banks is in entire accord with the rule established by state courts in construing statutes containing substantially similar provisions. In *Shellington v. Howland*, 53 N. Y. 376, it was said :

“There may have been a transfer by the defendant of his stock to the corporation in 1869, valid as between the parties to the transaction, and sufficient to vest the equitable title in the transferee, but the transfer was not consummated in the

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form required by statute, so as to affect the rights of strangers or to relieve the defendant from his legal liability to third persons for the debts of the corporation. . . . The transfer of stock, *quoad* the public, is not complete until entered on the book designated by statute. An entry upon the books of registry of stockholders is required for the protection of the company and its creditors, and each may hold the stockholders to their liability as such until they have divested themselves of the title to their shares by a completed transfer, as prescribed by law. No secret transfer will avail to release the stockholder from his obligations, or deprive the creditors of the corporation of the right to look to him as the responsible party liable for the debts of the corporation."

Indeed, this doctrine is so universally settled that it is treated as elementary. See *Thomp. Corp.* §§ 3283, 3284.

True it is that exceptions have been engrafted upon this doctrine as to national bank stockholders by decisions of this court, but none of them are germane to the matter now considered. Cases enunciating certain of the exceptions referred to are cited in the following summary:

1. Where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded and the real owner be held liable. *Germania Nat. Bank v. Case*, 99 U. S. 628, 631, 632, 25 L. Ed. 448, 449; *Bowden v. Johnson*, 107 U. S. 251, 261, *sub nom.* *Adams v. Johnson*, 27 L. Ed. 386, 389, 2 Sup. Ct. Rep. 246.

2. Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books, and extinguish the liability as stockholder of the transferrer. *Whitney v. Butler*, 118 U. S. 655, 30 L. Ed. 266, 7 Sup. Ct. Rep. 61. In the case just cited, in applying the exception, the court very carefully and accurately restated the general rule.

3. Where stock was transferred in pledge, and the pledgee

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for the purpose of protecting his contract caused the stock to be put in his name on the books as pledgee, it has been held that such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. *Pauly v. State Loan & T. Co.*, 165 U. S. 606, 41 L. Ed. 844, 17 Sup. Ct. Rep. 465.

These and other cases unnecessary to be referred to do not impair, but, on the contrary, serve to prove, the general rule. As in the case now before us the stock remained on the books in the name of Matteson, continued as a liability of the estate, and was never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the Minnesota statute.

Judgment affirmed.

ALDRICH

v.

CAMPBELL.

(*Circuit Court of Appeals, Ninth Circuit, Nov. 6, 1899.*)

Federal Courts—Jurisdiction—Amount in Controversy—Ancillary Suit.—As a receiver appointed by the comptroller of the currency to close up the affairs of an insolvent national bank may sue in a federal court without regard to the amount in controversy, and a suit in equity in a federal court to restrain such a receiver from prosecuting an action at law in the same court is merely ancillary to such action, the bill in such a suit cannot be demurrable on account of the amount in controversy.

Insolvent National Bank—Stockholder's Liability—Validity of Assessments by Comptroller—Right to Question.*—The comptroller of the currency is vested, by virtue of the national banking law, with authority to determine when it is necessary, in winding up the affairs of an insolvent national bank, to enforce the liability of the

*See notes at end of case.

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stockholders, and with power to levy assessments accordingly; and such determination and any action thereon are conclusive upon the stockholders, and not to be questioned in any litigation that may ensue, either at law or in equity.

Same—Authority of Comptroller to Levy Second Assessment.*—The comptroller of the currency may levy other assessments against the stockholders of an insolvent national bank, *pro rata* on all, if he determines that the first assessment is insufficient, provided all the assessments do not amount to more than the par value of the stock.

APPEAL by receiver from the circuit court of the United States for the Western division of the district of Washington.
Reversed.

This is an appeal by the defendant in the court below from two orders made by the circuit court of the United States for the district of Washington, Western division, overruling the demurrer of defendant to the bill of complaint, and granting an interlocutory injunction restraining the defendant, as receiver of the Tacoma National Bank, from proceeding further against the plaintiff in an action at law pending in the same court. It appears: That Louis D. Campbell, a citizen of the state of Washington, was a shareholder, to the extent of 100 shares, in the Tacoma National Bank, a national banking association organized under the national banking laws of the United States, with a capital stock of \$200,000. That on December 4, 1894, said bank suspended payment and closed its doors. Thereafter, on the 14th day of December, 1894, the then comptroller of the currency of the United States, in accordance with the banking laws of the United States, appointed one Philip Y. Anderson as receiver of said banking association, who duly qualified and took into his possession all of the assets and effects of the said banking association, and served as such receiver until the 30th day of January, 1899, when he resigned from said receivership, and the appellant in the present suit, J. Frank Aldrich, was appointed by the comptroller to serve in his stead. Aldrich thereupon qualified, and ever since has been the duly appointed, qualified, and acting receiver of said Tacoma National Bank of Tacoma. About the 27th day of

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April, 1895, upon a proper accounting made by thereceiver of said bank to the comptroller, and upon a valuation of the uncollected assets remaining in said receiver's hands, it appeared to the satisfaction of the comptroller of the currency that in order to pay the debts of said bank it would be necessary to enforce the individual liability of the stockholders thereof, as prescribed by sections 5151 and 5234 of the Revised Statutes of the United States, to the extent of \$130,000, or \$65 per share of the capital stock of said bank; and the comptroller accordingly levied an assessment in that amount upon the shareholders of said bank upon said 27th day of April, 1895, to be paid by them ratably on or before the 6th day of August, 1895, and directed said receiver to proceed, by suit or otherwise, to enforce to that extent the individual liability of the said stockholders. The appellee herein paid to said receiver \$6,500 in compliance with said assessment. A further assessment was made upon the shareholders of said bank by the comptroller on January 30, 1899, of \$34,000, or \$17 per share, to be paid ratably on March 1, 1899, with the same direction to the receiver to take the necessary proceedings for its enforcement. The appellee, Louis D. Campbell, refused to comply with the demand of the receiver for the payment of his *pro rata* of this assessment; and thereupon the receiver commenced an action at law in said circuit court against said Campbell, demanding judgment for \$1,700, with interest from January 30, 1899, and costs. Campbell then filed a bill in equity, stating the pendency of said action at law, and alleging that the total indebtedness of said bank at the time it suspended payment did not exceed \$222,362.34; that the total amount collected by the receivers from the assets of said bank was \$139,000; that the total amount of the assessment levied by the comptroller of the currency upon the shareholders was \$130,000; and that the sum of these two amounts, \$269,000, was at least \$46,637.66 in excess of the total indebtedness of said bank at the time it suspended payment, and largely in excess of said indebtedness plus the interest thereon to

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the time of said assessment, August 6, 1895. He further alleged that he was debarred from interposing these facts as a defense to the action at law, and could not obtain full and complete justice in said action; that the comptroller of the currency, by said assessment of August 6, 1895, had collected from said Campbell \$1,500 in excess of the amount lawfully assessable against him as a stockholder in said bank, wherefore he prayed that said comptroller and receiver be decreed to repay to him said sum of \$1,500, and be enjoined from further prosecuting the said action of law. The comptroller filed a plea to the jurisdiction of the circuit court for the district of Washington, and the bill was dismissed as against him. The receiver of said bank, J. Frank Aldrich, demurred to the bill on the ground of want of jurisdiction, for the reason that the amount in controversy was less than \$2,000, and the further ground that complainant had not in and by his bill stated such a cause as entitled him, in a court of equity, to any discovery from the respondent, or to any relief against him as to any of the matters contained therein. The court overruled the demurrer, and, in accordance with such ruling, entered an interlocutory order restraining the said Aldrich, as receiver of the Tacoma National Bank, until the hearing and determination of said cause, from proceeding further against said Campbell in the action at law pending in said court. From these orders an appeal is taken to this court.

P. Tillinghast, for appellant.

Campbell & Powell, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principal question in the proceedings under review is the action of the court below in overruling the demurrer of

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the respondent (appellant) to the bill in equity filed by the complainant (appellee). The first ground of this demurrer was the want of jurisdiction of the circuit court, for the reason that the amount in controversy was less than \$2,000. It has been repeatedly decided that a receiver appointed by the comptroller of the currency to close up the affairs of an insolvent national bank may sue in the federal court without regard to his citizenship, or the amount in controversy. *Price v. Abbott* (C. C.), 17 Fed. 506; *Platt v. Beach*, 2 Ben. 303, 19 Fed. Cas. 836; *Stanton v. Wilkeson*, 8 Ben. 357, 22 Fed. Cas. 1,074; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Kennedy*, 17 Wall. 19; *Myers v. Hettinger* (C. C. A.), 94 Fed. 370. It is also a well-settled principle of law that a bill filed in the equity side of a court to restrain or regulate a judgment or a suit at law in the same court is not an original suit, but ancillary and dependent, and merely supplementary to the original suit. *Cortes Co. v. Thannhauser* (C. C.), 9 Fed. 226; *Id.*, 21 Blatchf. 552, 18 Fed. 667; *Jones v. Andrews*, 10 Wall. 327; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Johnson v. Christian*, 125 U. S. 642, 8 Sup. Ct. 989, 1135. The bill demurred to here was ancillary to the common-law action brought by the receiver in the circuit court, and the jurisdiction of the court in the dependent case is founded upon the jurisdiction of the court over the original case.

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lary Suit.

The real controversy in the case at bar arises, however, on the second ground of demurrer, which presents this question: Does the bill state facts entitling complainant (appellee) to any relief or discovery in equity against said receiver? The bill alleges the total indebtedness of the bank at the time of suspension of payment; the amount collected by the receiver from the assets, and upon the first assessment levied by the comptroller; that these collections were in excess of the total indebtedness of the bank, including interest; and that the second assessment levied by

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the comptroller was for this reason unnecessary and unlawful. It is well established that the comptroller of the currency is vested, by virtue of the national banking law, with authority to determine when it is necessary, in winding up the affairs of an insolvent bank, to enforce the liability of the stockholders, and power to levy assessments accordingly; that such determination and any action thereon are conclusive upon the stockholders, and not to be questioned in any litigation that may ensue. *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673; *Bank v. Case*, 99 U. S. 628; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788; *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209; *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934; *Nead v. Wall (C. C.)*, 70 Fed. 806; *Young v. Wempe (C. C.)*, 46 Fed. 354; *Welles v. Stout (C. C.)*, 38 Fed. 67; *Aldrich v. Yates (C. C.)*, 95 Fed. 78.

It is admitted by the appellee that the comptroller's action in levying the first assessment was conclusive upon the shareholders, but he contends that, under the facts stated, the second assessment was a wrongful and illegal one, and exceeded the jurisdiction of the comptroller.

Section 5151 of the Revised Statutes of the United States provides as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *

Section 5234 provides:

"On becoming satisfied * * * that any association has refused to pay its circulating notes * * * and is in default, the comptroller of the currency may forthwith appoint a receiver. * * * Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it * * *

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and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.”

In *Kennedy v. Gibson*, *supra*, a bill in equity had been filed in the circuit court for the district of Maryland by Kennedy, the receiver of the Merchants' National Bank of Washington, in the District of Columbia. It was alleged in the bill that the bank had failed to redeem its circulating notes, and that the receiver had ascertained that the assets and credits of the bank were wholly insufficient to pay its debts and liabilities, and that it would be necessary to the complete and entire administration of his trust that recourse should be had to the personal liability imposed on the stockholders by law. The bill, however, contained no averment of any action by the comptroller touching the personal liability of the stockholders. The defendants demurred to the bill, and the demurrer was sustained, whereupon the case was appealed to the supreme court. The principal question there was whether the omission of the bill to aver action by the comptroller touching the personal liability of the stockholders prior to suit being brought by the receiver was fatal to the bill. The court, in answering this question, explained the scope and purpose of the law relating to the dissolution of national banks in such full and explicit language that no doubt is left as to the power and duty of the comptroller, and the authority of the receiver of the bank, acting under his direction. The court said :

“The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as

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shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved. The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity; and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors, and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law. The interests of the creditors require it, and it was the obvious policy and purpose of congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed, than that the evils of delay should be encountered.”

In *Casey v. Galli*, 94 U. S. 673, the action was at law to enforce the individual liability of the defendant as a stockholder of an insolvent national bank. The defendant demurred to the declaration, and assigned, among other causes of demurrer, that the declaration demanded a larger sum than

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the defendant was required by the statute to pay, and also an additional sum by way of interest. The defendant was also permitted to enter a plea to the declaration, alleging, among other things, that the comptroller of the currency had determined and decided to exact from the defendant, and from a number of stockholders of the bank less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said bank, with the intent and purpose to compel the defendant, and others of the shareholders who might be solvent, to contribute the entire sum necessary to pay the debts and liabilities of the bank, without any contribution from those who were insolvent. The court denied the sufficiency of these defenses; holding that the order of the comptroller was conclusive, and could not be controverted in a suit against the stockholders.

The appellee in the present case does not deny the authority of the comptroller as declared by these decisions, but he seeks to avoid the effect of such authority by contending that while, in an action on the part of a receiver of a national bank to recover an assessment, no defense can be interposed by the stockholder to such an action, however excessive or wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action; and in support of this contention he relies upon an observation of MR. JUSTICE SWAYNE in delivering the opinion of the supreme court of the United States in the case of *U. S. v. Knox*, 102 U. S. 422. In that case the comptroller had levied an assessment of 70 per cent. upon the par value of each share of stock of the insolvent bank, and ordered the receiver to collect the assessment. By reason of the insolvency of many of the shareholders, not half of the amount of this assessment was collected. A large creditor of the bank requested the comptroller to order a further assessment of 30 per cent. upon each share of the capital stock, for the discharge of the remainder of the bank's indebtedness. The comptroller refused to do so, because the enforcement of such an assessment would compel the solvent shareholders to pay

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the sums and proportions due from the insolvent shareholders. A writ of *mandamus* was then petitioned for, directed to the comptroller, and refused in the lower court. In the United States supreme court the legislation which resulted in the provisions of section 5151 of the Revised Statutes was reviewed, and the court held that, as the law did not intend the shareholders to be put in the relation of guarantors or sureties "one for another" as to the amount which each might be required to pay, the insolvency of one stockholder did not in any wise affect the liability of another. It was accordingly held that the comptroller had decided correctly as to his duty in the premises, but the court made this further observation: "Although assessments made by the comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

The appellee relies upon this last declaration of the court to support his action in his suit in equity. It should be noted, however, in this connection, that, immediately following the language quoted, the court distinctly reaffirms the doctrine of the cases to which reference has been made. The court says:

"Nothing in this opinion is intended in any wise to affect the authority of *Kennedy v. Gibson*, 8 Wall. 498, and *Casey v. Galli*, 94 U. S. 673. On the contrary, we approve and reaffirm the rule laid down in those cases."

It will be seen that the point to be decided in *U. S. v. Knox* was whether the comptroller was clothed with the power to make a second assessment that would, in effect, require certain solvent shareholders to pay, in addition to the amount due and paid by them, the proportionate sums due and delinquent on the first assessment from certain insolvent

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shareholders, and whether the solvent shareholders were thus liable for the default of the insolvent shareholders. The law had distinctly provided otherwise when it declared in section 5151 of the Revised Statutes that the shareholders of every national bank should be held individually responsible, equally and ratably, and not one for another. Had the comptroller attempted to make such an assessment, he would have been acting beyond the scope of his authority, and subject to the restraining power of the court. But that is not the proposition in the case at bar, as here the first assessment was fully paid. The comptroller has found the amount insufficient to meet all the bank's liabilities, including interest on the debts of the bank accruing subsequent to the first assessment, and the expenses of the receivership, and in accordance with the power and authority, judicial and executory, vested in him, has levied a second assessment upon the shareholders. The authority to do this is not controverted, even in the case just cited. On the contrary, it is there said :

"Assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders. * * * "

And the only qualification of this declaration is that if the comptroller were to attempt to enforce an assessment made clearly and palpably contrary to the views expressed, namely, as to the liability of the solvent shareholders for those insolvent, a court of equity would doubtless restrain him by injunction. This last statement, as to what a court of equity would do, was limited to the facts of that case, and clearly ought not to be extended to facts of a wholly different character. In the present case the comptroller has not attempted to enforce an assessment contrary to the views so expressed, but, on the contrary, he has acted entirely in accord with the principles there announced. This is made perfectly clear, if we consider the power of the comptroller with respect to the conditions under which he acted, as disclosed by the bill :

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The comptroller of the currency has jurisdiction to enforce by assessment the individual liability of the stockholders of an insolvent national bank, equally and ratably, and not one for another, to the extent of the amount of their stock in the bank, at the par value thereof. Acting within this clearly-defined authority, an order of the comptroller directing an assessment is absolutely conclusive upon the stockholders of the bank, and cannot be controverted by them in any defense they may seek to interpose against an action based upon such an assessment. The par value of the stock of a national bank is \$100 for each share. It appears from the bill in this case that the comptroller, in the progress of the proceedings in liquidation of the Tacoma National Bank, did,

Same--Authority
of Comptroller to
Levy Second
Assessment.

on the 27th day of April, 1895, levy an assessment, equally and ratably, upon all the shareholders of the bank, at the rate of \$65 per share.

This assessment, being \$35 per share less than the par value of the stock, did not exhaust the jurisdiction of the comptroller to raise, within that limit, by assessment upon the stockholders of the bank, funds to meet the contracts, debts, and engagements of the bank. On the 30th day of January, 1899, the comptroller levied a second assessment, equally and ratably, on all the stockholders of the bank, at the rate of \$17 per share; making a total for the two assessments of \$82 per share. These two assessments, being together \$18 less than the par value of the stock, were within the jurisdiction of the comptroller to make in the proceedings which he had instituted to wind up the affairs of the bank; and against this second assessment it is no defense, either at law or in equity, to say that the first assessment was more than sufficient to pay the contracts, debts, and engagements of the bank. *Kennedy v. Gibson, supra.* Whether that assessment was sufficient is a question which the law has placed wholly within the power of the comptroller to determine, and without some showing of fraud, accident, or mistake, it must be deemed by the court to have been insufficient, and the necessity for a second assessment conclusive. The obliga-

Notes

tions of a stockholder of the bank, as well as the power of the comptroller, representing the rights of the creditors of the bank, to enforce such obligations, are defined by positive rules; and the point at which the right of the stockholder to deny his liability ceases, and the power of the comptroller to enforce it commences, is clearly established. These rules cannot be contravened or varied by the interposition of a court of equity. *Adler v. Fenton*, 24 How. 407, 411. "Wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, '*Æquitas sequitur legem*,' is strictly applicable." *Magniac v. Thomson*, 15 How. 281, 299.

It follows that the bill does not state facts sufficient to entitle the complainant to any relief in equity, and the demurrer should have been sustained. There is still the further objection to the bill that it is a collateral attack upon a judicial or quasi judicial decision, and, under the principles announced by this court in *Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326, cannot be maintained. The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to sustain the demurrer and dismiss the bill.

NOTES.

National Banks—Insolvency—Assessment by Comptroller—Conclusiveness.—The decision of the comptroller as to the amount of an assessment to be made upon the stockholders of an insolvent national bank is conclusive against such stockholders. *Kennedy v. Gibson*, 75 U. S. 498; *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. Rep. 227; *Casey v. Galli*, 94 U. S. 673; *De Weese v. Smith*, 97 Fed. Rep. 309.

Likewise as to the necessity of an assessment. *Strong v. Southworth*, 8 Ben. (U. S.) 331.

And his decision that a deficiency exists cannot be appealed from. *Bailey v. Sawyer*, 4 Dill. (U. S.) 463.

So the receiver's accounts as to the bank's resources and liabilities cannot be gone into by the stockholders, but they must accept the

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action of the comptroller in making the assessment. *Man v. Cheeseman*, Fed. Cas. No. 9002a.

Same—Same—Power of Comptroller to Make Second Assessment.—In *De Weese v. Smith*, 97 Fed. Rep. 309, it was held that the comptroller in making one assessment exhausted his power and jurisdiction under the statute, and could not make a second assessment.

BLADES

v.

GRANT COUNTY DEPOSIT BANK *et al.*

(*Court of Appeals of Kentucky, April 18, 1900.*)

Checks—Dishonor—Limitations—Estoppel.*—The statute of limitations began to run against the holder of a certified check from the date of the bank's refusal to pay it to him; and the bank could not be estopped from pleading the statute by reason of the fact that it had in the publication of its condition required by law stated that such check was an indebtedness of the bank.

APPEAL by plaintiff from Grant county circuit court.
Affirmed.

L. T. Applegate and *C. C. Cram*, for appellant.

W. W. Dickerson, for appellees.

BURNAM, J. This is the second appeal in this case from judgments rendered in the lower court. The opinion rendered in the first appeal is reported in 40 S. W. 246. The facts as they appear from that opinion are: That on the 3d day of January, 1888, Bennett & Clark, a firm, drew a check payable to themselves on the Grant County Deposit Bank for \$100, upon the face of which was written by its cashier these words: "Good for one hundred dollars, when properly indorsed. 1/3/'88. W. G. Frank, Cashier." That Bennett & Clark, in part consideration of a horse, indorsed and delivered the check to appellant, who on the

*See note at end of case.

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5th day of January, 1888, presented it to, and demanded the payment thereof, of, appellee, which was refused by order of Bennett & Clark. On the 21st of September, 1893, appellant instituted an action against the bank to recover the amount of the check, interest, and protest fee. The bank filed an answer in which it pleaded—First, the five-years statute of limitation; and, second, that Bennett & Clark had countermanded the payment of the check, and had notified it that the check had been procured from them by plaintiff by fraud, and that he had no right to collect the same. It also made its answer a counterclaim against Bennett & Clark, and asked that plaintiff and Bennett & Clark be compelled to litigate and adjust the dispute between them as to the check. The chancellor sustained a general demurrer to the paragraph of the answer which relied upon the five-years statute of limitation, and the case was tried out upon the issue between appellant and Bennett & Clark as to the warranty of soundness of the horse, and failure of consideration for the check, which trial resulted in a judgment dismissing the petition of appellant. An appeal was prosecuted from that judgment, and this court, in an opinion by CHIEF JUSTICE LEWIS, held that the circuit judge erred in sustaining a demurrer to the plea of limitation relied upon in the answer,—holding that this action must have been brought within five years after the accrual of the right to do so,—and further held that the plaintiff might, if he had been advised that the plea of limitation was good, have pleaded something which would take the case out of the statute, and therefore reversed the judgment, with directions that “appellant should be given an opportunity to set up in reply whatever he could properly plead in avoidance of the defense of limitation.” On the return of the case to the lower court, appellant replied to the plea of limitation that appellee was by law required to publish at least four times each year a statement of its condition in a newspaper of the county; that it had complied with the law, and made such publications, and had

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in each of these publications stated that this check was an indebtedness of the bank; and he pleaded that such publications were an acknowledgment of the validity of the check, and operated as a promise to pay same, and that the bank was thereby estopped from pleading the statute of limitation. The lower court sustained a demurrer to this reply, and again dismissed appellant's petition, and from that judgment this appeal is prosecuted; and the only question before the court on this appeal is, did the alleged publications deprive appellee of the right to plead and reply upon the statute? We think not. It is not important in the determination of this question how the bank kept the accounts of its customers; and, as to appellant, it had distinctly refused to pay the check to him more than five years before the institution of his action, and the statute of limitation began to run at that date, and appellee's right to reply upon this defense was not affected by its compliance with the statutory regulation which required a publication of the statement of its accounts with its customers. The question of appellee's liability to Bennett & Clark for this deposit is not raised in this action, and we are of the opinion that the chancellor did not err in sustaining the demurrer to the reply. For the reasons indicated, the judgment is affirmed.

NOTE.

Certified Checks—Limitation of Action.—The statute does not begin to run as against a certified check until demand of payment has been made at the bank on which it is drawn and refused. *Girard Bank v. Penn Tp. Bank*, 39 Pa. St. 92, 80 Am. Dec. 507.

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FEALEY

v.

BULL.

(Court of Appeals of New York, June 12, 1900.)

Appeal—Review.—It was claimed that the appellate division having held that the verdict was against the weight of the evidence, it was the duty of the trial court to nonsuit on the subsequent trial of the case, the evidence being substantially the same as upon the former trial. *Held*, on appeal from a judgment of the appellate division affirming a judgment for plaintiff, that the power to review questions of fact ceased with the appellate division.

Check, Whether Overdue.*—The fact that a check is acquired five days after its delivery to the drawee does not render it overdue and subject it to any defense that may exist between the original parties.

APPEAL by defendant from Third department appellate division supreme court. *Affirmed.*

Irving H. Palmer and Henry A. Dickinson, for appellant.
James Dougherty, for respondent.

CULLEN, J. This action was brought by the indorsee against the drawer to recover the amount of a check. The case was submitted to the jury on specific questions of fact, and no general verdict was rendered. The first question was, "Has the plaintiff satisfied the jury by a fair preponderance of evidence that she has purchased the check in good faith, and paid value therefor?" This the jury answered in the affirmative. It is not necessary to refer to the disposition of the other question submitted to the jury. On this finding the trial court directed a judgment to be entered for the plaintiff, which judgment has been affirmed

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*See *Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co.* (S. Car.), 2 Mun. Corp. Cas. 128, and *notes*, p. 152.

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by the appellate division. There have been three trials of this action, all of which have resulted in favor of the plaintiff. The first verdict was set aside by the appellate division as being against the weight of evidence. 71 Hun 402, 24 N. Y. Supp. 988. The second met with similar fate on the ground of misconduct on the part of one of the jurors. 11 App. Div. 468, 42 N. Y. Supp. 569.

It is claimed by the appellant that the appellate division having held that the verdict was against the weight of evidence, it was the duty of the trial court to nonsuit on the subsequent trial, the evidence being substantially the same as upon the former trial; and the refusal of the court to dismiss the complaint for this reason is the first error complained of. In support of this contention the appellant relies on *Cohn v. Brewing Co.*, 38 App. Div. 5, 56 N. Y. Supp. 293, and *McDonald v. Railway Co.*, 46 App. Div. 143, 61 N. Y. Supp. 817, in which it is said that, "where the weight of evidence is so decidedly preponderating in favor of one party that a verdict contrary to that preponderance would be set aside on motion, a trial judge should nonsuit, or direct a verdict, as the case may require." Whether the rule thus declared is correct or not, so far as it governs the action of trial courts or the appellate division, a failure to comply with it, and a submission of the case to the jury, where the evidence is sufficient to support a verdict either way, present no error of law which may be reviewed by this court. In *Colt v. Railroad Co.*, 49 N. Y. 671, JUDGE ALLEN, for this court, wrote: "The credibility of the witnesses and the effect and weight of the conflicting and contradictory testimony were questions solely for the jury, and were properly submitted to them, and present no question of law. It is only where there is no evidence which, if believed, will sustain a verdict for the plaintiff, that the court is called upon to nonsuit. If the facts stated by the witnesses, or the facts stated with such reasonable inferences as the jury will be authorized to draw from them, if true, would authorize a verdict for the

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plaintiff, a nonsuit ought not to be granted. The court is not authorized to take the case from the jury merely because, in the opinion of the judge, the witnesses are not entitled to credit, or the weight of evidence in a case of a conflict of testimony is with the defendant. It is not enough to justify a nonsuit that the court, on a case-made, might, in the exercise of its discretion, grant a new trial, and give the parties the privilege of submitting the questions of fact to another jury. The evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial. In *Bagley v. Bowe*, 105 N. Y. 171, 11 N. E. 386, this court said: "The trial court or the general term is authorized to set aside a verdict, and direct the issue to be retried before another jury, if in its judgment the verdict is against the weight or preponderance of evidence; but, in a case which of right is triable by jury, the court cannot take from that tribunal the ultimate decision of the fact, unless the fact is either uncontradicted or the contradiction is illusory, or where, to use a current word, the answering evidence is a 'scintilla,' merely." In this last case a judgment entered on a verdict directed by the trial court was reversed; so the case would seem to be an authority not only for the proposition that the failure to direct a verdict for preponderance of evidence does not constitute an error of law cognizable by us, but also for the further proposition that such a direction is legal error.

The dicta in the two cases cited from the appellate division seem to be principally based on the authority of certain decisions in this court. In *Linkauf v. Lombard*, 137 N. Y. 417, 426, 33 N. E. 475, it is said that "the rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require." A statement substantially similar is to

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be found in *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440. Taken by themselves, these declarations apparently afford some justification for the rule asserted in the cases cited from the appellate division. But to excerpt a single sentence from a judicial opinion, and construe and interpret it apart from the context of the opinion in which it is found, and without regard to the subject-matter under discussion, is not only unreasonable, but at times leads to erroneous conclusions. This court has always disclaimed authority to review the determination of the courts below on questions of fact, except in a limited class of cases. *Mead v. Bunn*, 32 N. Y. 275. Therefore, had there been a real or substantial conflict of evidence in the *Linkauf* and *Hemmens* Cases, we would have had no power to reverse the judgments there rendered on matters of fact. On the other hand, this court has always asserted the doctrine that a finding of fact without evidence to support it constitutes an error of law (*Mason v. Lord*, 40 N. Y. 476), and that, in law, a finding on insufficient evidence is a finding without evidence (*Pollock v. Pollock*, 71 N. Y. 137). In the last case JUDGE FOLGER quoted MAULE, J. (*Jewell v. Parr*, 13 C. B. 916), with approval, as saying, "When we say that there no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." Even a casual reading of the opinion in the *Linkauf* Case shows that it is but an authority for the doctrine that, as to the submission of a cause to the jury, the question is not whether there is any evidence to make out a case of liability, but whether there is sufficient evidence to establish that fact; and evidence which rests in mere surmise or speculation is insufficient to present an issue, as against the positive evidence of a defendant, or the reasonable and legal inference from facts conceded or established upon the trial. In that case it is said, referring to the evidence: "At most, it was only open to a surmise that the defendants were individually concerned in running this steamship line, and that was not enough to justify the trial judge in letting the

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case go to the jury. To permit a jury to speculate and surmise upon a question of responsibility is to withdraw from the litigant a safeguard intended for the protection of his rights." So, also, in the Hemmens Case, referring to a question of fact in the case, the opinion says: "Still, however improbable it may appear, if there was any evidence the question was doubtless for the jury." The doctrine of both cases is the same. There must be not only some evidence, but the evidence must be sufficient in its nature to warrant the court in submitting a cause to the jury. In nearly all the cases where it has been held that a scintilla of evidence was not sufficient to uphold the verdict, the proof has been a matter of inference. But the rule also applies to cases of direct evidence. The testimony of a witness may be in such contradiction of matters of common knowledge or the laws of nature as to be incredible, as a matter of law. *In re Harriot's Estate*, 145 N. Y. 540, 40 N. E. 246. A witness may be so discredited by his own confession that his uncorroborated testimony is insufficient in law to justify a verdict. *People v. Evans*, 40 N. Y. 1. We do not assume to enumerate all the cases where a verdict or a nonsuit should be properly directed. Where, however, the right to a verdict depends on the credibility to be accorded witnesses, and the testimony is not incredible or insufficient as a matter of law, the question of fact is for the jury to determine. In the case before us the plaintiff testified to a state of facts which, if believed, entitled her to recover. Her story was not incredible, as a matter of law, though it contained improbabilities, and may have been open to suspicion. In some matters she was contradicted by the defendant's witnesses. The jury might have discredited the plaintiff, and the court, in its exercise of its discretion, might have set the finding in her favor aside and awarded a new trial, but the power to review the question of fact ceased with the appellate division.

The plaintiff testified to having acquired the check five days after its delivery to the drawee, and the appellant con-

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tends that this lapse of time rendered the paper overdue, and subjected it to any defense that might exist between the original parties. Such does not seem to be the law. Daniel, Neg. Inst. § 1684; Herrick *v.* Woolverton, 41 N. Y. 581; Wheeler *v.* Warner, 47 N. Y. 519; Bank *v.* Harris, 108 Mass. 514. The judgment appealed from should be affirmed, with costs.

Check. Whether
Overdue.

PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment affirmed.

BINGHAMTON TRUST CO.

v.

AUTEN.

(*Supreme Court of Arkansas, June 16, 1900.*)

Action for Deceit—Return of Consideration.—A party who is induced to purchase property by deceit and fraud may affirm the contract, and sue for damages occasioned by the deceit and fraud, without returning or offering to return what he received under the contract.

Same—Liability of National Bank for Fraud of President.*—In an action for damages against the receiver of a national bank, for deceit and fraud practiced upon plaintiff, by which it was induced to pay out a large sum of money for the worthless note of an insolvent company, it appeared that the president of the bank, as such, was endeavoring to collect a debt due it, and, for this purpose, the note was executed and delivered to him, and negotiated by him to plaintiff; that his letter to plaintiff by which he effected the sale of the note by making fraudulent statements as to the maker's condition, was written upon paper upon which was the bank's letter head; that he assumed in such letter that he was acting for the bank, and directed plaintiff to remit the proceeds to the bank, and signed the

*See note at end of case.

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letter as president; and that it was his duty, as president, to endeavor to collect the debt. *Held*, that the bank was liable for the damages occasioned by this fraud, at least to the extent of the benefit received by it from the fraud.

Usury.—In such action defendant's contention that the discount of the note by plaintiff was usurious and illegal, stated no defense, whether it was a New York or an Arkansas contract; as a statute of the former does not permit a corporation to interpose the defense of usury, and under the laws of Arkansas the rate charged was legal.

APPEAL by plaintiff from Pulaski county Second division circuit court. *Reversed*.

The McCarthy-Joyce Company, an Arkansas corporation, was on the 7th of December, 1892, indebted to the First National Bank of Little Rock in the sum of \$30,000; its account with the bank being overdrawn to that amount. For the purpose of raising money to pay off a portion of this debt, the company on that day executed to James Joyce two notes, for \$5,000 each, one due in four and the other in five months. We copy one of them: "\$5,000.00. Little Rock, Ark.. Dec. 7, 1892. Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arks., with interest from maturity at the rate of 10 per cent. per annum until paid. McCarthy-Joyce Company, Geo. Mandlebaum, Secretary & Treasurer." The notes were indorsed by James Joyce, the payee, in blank, and were delivered by the company to H. G. Allis, president of the bank, to be negotiated by him; the proceeds thereof to be applied on the debt of the company to the bank. Allis indorsed the notes, and then transmitted them to the Binghamton Trust Company, of Binghamton, N. Y., in the following letter: "Capital and Surplus, \$600,000. H. G. Allis, President. W. C. Denny, Cashier. First National Bank of Little Rock, Arks. December 10, 1892. Binghamton Trust Company—Gentlemen: I inclose you two notes of the McCarthy-Joyce Company, one at four

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months, the other at five months, from the 7th inst., for \$5,000 each. This company now has on hand 1,500 bales of cotton, worth in the neighborhood of \$70,000. It is probable they will have to hold this cotton for sixty or ninety days. I indorse the paper myself, in order that it may be subjected to any collateral of mine in your hands. The paper is absolutely good, as we hold insurance and warehouse receipts on all this cotton. If you can handle it, kindly remit the amount of the notes to the United States National Bank of New York for our credit, and advise me proceeds by wire; otherwise, return. Yours, very truly, H. G. Allis, President." The statements in the letter were false. The McCarthy-Joyce Company was insolvent. It did not have on hand the cotton mentioned, nor did Allis or the bank have warehouse receipts for the cotton. The trust company, being misled by these false statements, accepted the note, and remitted in payment for the same \$9,710 to the United States Bank of New York, which was placed to the credit of the First National Bank, and by that bank credited on the account of the McCarthy-Joyce Company. One of the notes was taken by the trust company for itself, and the other for the Deposit Bank of New York. The trust company afterwards brought this action against the First National Bank to recover damages for deceit on account of the false statements of its president, Allis. The circuit court found in favor of the defendant, and the trust company appealed.

Blackwood & Williams, for appellant.

Hill & Auten, for appellee.

RIDDICK, J. (after stating the facts). This is an action by the Binghamton Trust Company against the First National Bank of Little Rock to recover damages for deceit. The company does not ask for a rescission of its contract with the president of the bank by which it became the owner of the note of the McCarthy-Joyce Company. It asks for damages for deceit and fraud practiced upon it by which it was induced to pay out a large sum of money for the worthless

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note of an insolvent company. A party who is induced to purchase property by deceit and fraud has an election of remedies. He may rescind the contract, and to do this he must return or offer to return what he has received under it. On the other hand, he may affirm the contract, and sue for damages occasioned by the deceit and fraud; and in that event he is not required to return or offer to return what he has received under the contract. These rules are well settled, and the contention of the bank that plaintiff should have returned or offered to return the notes must be overruled. *Goodwin v. Robinson*, 30 Ark. 535; *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; 14 Am. & Eng. Enc. Law (2nd Ed.) 168, and cases cited.

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—Return of
Consideration.

The next contention is that Allis was not acting for the bank, but for the McCarthy-Joyce Company, and that he had no authority to bind the bank by his false representations. Allis was president of the bank, to which the McCarthy Joyce Company was indebted in a large amount. This company was financially embarrassed, and in fact insolvent. As president of the bank, Allis was endeavoring to collect this debt. For this purpose these notes were executed and delivered to him, and for this purpose he negotiated them to the trust company. His letter to the trust company by which he effected the sale of the notes is written on paper upon which is the bank's letter head. He assumes in the letter to be acting for the bank, and directs the company to remit the proceeds to "our credit" (meaning the bank), and signs the letter, "H. G. Allis, President." As president of the bank, it was his duty to endeavor to collect the debt which the McCarthy Joyce Company owed it. While he may have been trying to befriend the McCarthy-Joyce Company as well as to protect the bank, the evidence leaves no doubt in our minds that in this matter he was acting for the bank, and endeavoring to protect its interests. It is a matter of no moment that the directors of the bank did not know or authorize the false representations of Allis. We must, to quote the language of Mr. Benjamin,

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of President.

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"distinguish between authority to commit a fraudulent act, and authority to transact the business in the course of which the fraudulent act was committed." The bank, of course, did not authorize Allis to commit a fraud, "but it intrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment." Benjamin, Q. C., in *Mackay v. President, etc.*, L. R. 5 P. C. 402. If a conductor having charge of a railway train in the course of his business commits an assault upon a passenger, the company may be liable for the damages, though it neither authorized nor desired its agent to commit such an assault; for the principal is liable for the wrong of the agent committed in the course of his duties as agent. On the same principle, a bank is liable for the fraud of its agent committee in the course of the bank's business. This rule is often applied, and hardly needs citation of cases to support it. In this case, as before stated, the fraud was committed by Allis as a means of collecting a debt due the bank from another party. It was done in the interest of the bank, and the bank received the money obtained by his fraud. Under these circumstances, the bank cannot at the same time retain the benefit and avoid the liability. That the bank is liable for the damages occasioned by this fraud of its agent, at least to the extent of the benefit received by it from the fraud, follows from settled rules of law, as well as from the plainest principles of justice. *Mackay v. President, etc.*, L. R. 5 P. C. 394; *Barwick v. Bank*, L. R. 2 Exch. 259; *Swire v. Francis*, L. R. 3 App. Cas. 106; *Fishkill Sav. Inst. v. National Bank*, 80 N. Y. 162.

The question of the authority of the company to discount notes is also involved in this case, but we have already determined that the bank had such authority, in another case between the same parties, and refer to our opinion in that case for our reasons for this conclusion.

The only remaining question arises on the contention by the bank that the discount of the notes by the trust company

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at the rate of 7 per cent. per annum was, under the laws of New York, illegal and usurious. Now, conceding Usury. that this was a loan, and not a mere purchase of the note, the trust company could, under the New York statute of 1892, charge 6 per cent. interest and reasonable collection charges. In the absence of any proof as to what the collection charges were, we are not sure that we could hold the 7 per cent. to be usurious under New York law, and it certainly would not be under the law of this state. But we need not discuss that question further; for, in order to show usury in this transaction, the defendant corporation relies upon a law of New York, but under another statute of that state a corporation cannot interpose the defense of usury. The statute, as construed by the courts of that state, operates to make lawful the contract of a corporation for the loan of money to itself which would otherwise be usurious and void. *Rosa v. Butterfield*, 33 N. Y. 665; *Lane & Co. v. Watson*, 51 N. J. Law, 188, 17 Atl. 117; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. Ed. 385. This statute applies to all corporations borrowing money in New York, and we know of no reason why it should not apply to a national bank. If there is any class of corporations which should not be permitted to plead usury, certainly banks should not be allowed to do so. All parties to this contract were corporations, and the contract was valid under the law of New York; and, if valid in the state where made, it is valid everywhere. If it was an Arkansas contract, it was valid, because it is not unlawful to charge 7 per cent. in this state. So there is no usury, whether it is a New York or an Arkansas contract.

The note which the trust company was led to purchase through the fraud of the bank's president was shown to be worthless, and we think the trust company has made out a clear case to recover damages to the amount it paid to the bank on the note purchased. The judgment of the circuit court will be reversed, and a judgment entered here for that

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amount in favor of the trust company, with interest from date of payment.

BATTLE, J., did not participate.

NOTE.

National Banks—Liability for False Representations of Officers.—See *Pronger v. Old Nat. Bank* (Wash.), 1 Banking Cases 399; *American Nat. Bank v. Hammond* (Colo.), 1 Banking Cases 409.

In *Nevada Bank v. Portland Nat. Bank* (C. C.), 59 Fed. Rep. 338, it was held that the fraudulent representations of a national bank's cashier as to a customer's financial condition rendered the bank liable. See also *City Nat. Bank v. Thomas*, 46 Neb. 861; *Crawford v. Boston S. M. Co.*, 67 Mo. App. 39; *Hindman v. First Nat. Bank* (C. C.), 86 Fed. Rep. 1013; *Lieberman v. First Nat. Bank* (Del.), 40 Atl. Rep. 382; *First Nat. Bank v. Marshall & I. Bank* (C. C. A.), 83 Fed. Rep. 725, 54 U. S. App. 510, 28 C. C. A. 42.

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v.

STATE BANK OF WHEATLAND.

(*Supreme Court of North Dakota, May 24, 1900.*)

Deposits—Evidence—Deposit Slips and Pass Books—Parol Testimony.*—The issuance of a deposit slip by a bank or the entry of a deposit in a pass book has only the effect of a receipt for money. While it raises a presumption that the deposit was made, yet it is open to parol explanation.

Same—Same—Loans.—But where D. was indebted to A. & G., and applied to the bank for a credit for the amount for a few days, promising to then deposit to balance the credit, and such credit was given, the transaction amounted to a loan by the bank to D. of the amount; and where D. took a deposit slip in the name of A. & G. for the amount, and also a pass book in their name, in which the deposit of the amount was entered, and delivered the same to A. & G. as payment of his debt, the legal effect was a deposit by A. & G.

*See note at end of case.

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of the amount for which the credit was given, and the failure of D. to fulfill the promise upon which the credit was extended could not affect the legal rights of A. & G.

(Syllabus by the Court.)

APPEAL by defendant from Cass county district court.
Affirmed.

John E. Greene, for appellant.

Ball, Watson & Maclay, for respondents.

BARTHOLOMEW, C. J. This action was brought to recover the amount of two deposits which plaintiffs allege were made to their credit in the defendant bank. The answer was a denial of the deposits. The case was tried to a jury, and a verdict directed for the plaintiffs for full amount claimed. Motion for new trial denied, and defendant appeals. Case Stated.

A number of errors are assigned upon the rulings of the court in excluding testimony offered by the defendant, but our application of the law to the conceded facts will show that the excluded testimony was entirely immaterial. The remaining assignments relate to the sufficiency of the admitted evidence to warrant the action of the court in directing a verdict for plaintiffs. They may be considered collectively. The following facts are undisputed: The plaintiffs are co-partners, with their business headquarters in Minneapolis. In 1898 and prior thereto they operated grain elevators in this state, one of which was situated at Wheatland, in Cass county. Prior to June 13, 1898, one Diemer had been the agent of plaintiffs in purchasing grain and conducting their business at Wheatland. One Cousins was plaintiffs' general agent in this state, with headquarters at Fargo. The defendant bank was doing business in Wheatland, and an account was kept in said bank in the name of the agent, Diemer, from which payments were made for the grain purchased by said agent at that point. The funds for this account were received by said bank through drafts made by Diemer upon the firm at Minneapolis, and through drafts

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sent direct by the firm, and through currency deposited by Mr. Diemer. This fund was paid out on the individual checks of Diemer. The firm paid the bank a small commission for paying out the money, but it is entirely clear that the account was the individual account of Diemer. On June 13, 1898, the general agent, Cousins, visited Wheatland for the purpose of closing Diemer's agency, as he (Diemer) wished to quit the service by reason of ill health. From the data then accessible, the general agent and Diemer reached the conclusion that Diemer owed the firm the sum of \$456.39. Mr. Diemer then went to the residence of the cashier of the defendant bank,—the cashier not having gone to the bank that morning,—and informed him that he (Diemer) wanted a credit at the bank for the sum of \$456.39 for two days, stating that he expected a remittance by that time. The cashier (Mr. Mares) wrote a note to the bookkeeper (Miss Campbell), who acted as cashier in the absence of Mr. Mares, authorizing her to give Diemer credit for the sum of \$456.39. This was done, and Mr. Diemer took the credit in the form of a deposit slip in the name of Andrews & Gage for the amount. The bookkeeper also gave him a pass book for Andrews & Gage, in which was entered on that date a deposit of \$456.39. The deposit slip and the pass book were turned over by Diemer to the general agent. When this settlement was reported to plaintiffs they claimed that the settlement was incorrect, and that there was still \$131.67 due from Mr. Diemer. On June 22d, nine days after the visit just mentioned, Mr. Cousins again went to Wheatland, and saw Mr. Diemer, and reported to him the statement of the firm. Mr. Diemer immediately said that he had already discovered the mistake, and that he would go over to the bank and deposit the amount. He at once went to the bank, and in a few minutes returned with a deposit slip, in plaintiffs' name, for the exact amount due, and turned it over to Mr. Cousins. There is a little uncertainty surrounding the issuance of this deposit slip. It is one of the forms used by the bank. It is dated June 13th, same date as the other slip, yet it could not have been delivered until June 22d. Mr.

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Mares testifies that he did not make it. The bookkeeper testifies that it is in Mr. Mares' handwriting. But this uncertainty is immaterial. Another agent had been installed in Diemer's place. The pass book that had been given to plaintiffs was in his possession. As soon as the second slip was received this agent took the pass book to the bank, and asked to have the deposit entered thereon. The bookkeeper took the book and passed into the back room, and, returning a moment later, made the entry showing a deposit of \$131.67 on June 22, 1898. She testifies that the cashier informed her that this amount was to be turned over to plaintiffs. This transaction being in turn reported to plaintiffs, they drew their draft a few days later upon the defendant bank for the full amount of the two deposits. Payment of this draft was refused, except as to the sum of \$111.98. The ground of this refusal was the fact that no deposit was made by Diemer as promised to balance the credit of \$156.39 given on June 13th, and for which the first deposit slip was given and entered in the pass book, and at the time the second deposit slip was given and the entry made Diemer had in said bank the sum of \$111.98, and no more.

Counsel for appellant urges that this refusal was justified, and that under these facts there is no liability on the part of the bank except for the sum of \$111.98, which was tendered and refused. Counsel insists that the principles of estoppel cannot be applied to this case; that the facts do not create an estoppel. But we do not think any question of estoppel enters into this case. It is not a case where the truth need be suppressed. If the deposits were not, in legal contemplation, made, then plaintiffs cannot recover; if they were so made, then they should recover. And, moreover, we agree with counsel that the issuance of a deposit slip or an entry of a deposit in the pass book has no other or greater force than a receipt for money, and is open to parol explanation. *Talcott v. Bank* (Kan. Sup.), 36 Pac. 1066. But we are clear that, in legal effect, the deposits were made by plaintiffs just as

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the entries show. We discuss the first deposit. Diemer told the cashier that he desired credit for the amount for a few days, and he would then deposit to balance. The cashier extended the credit. Without taking a note or any written evidence of indebtedness, he instructed his bookkeeper to extend the credit, and it was done. The transaction was, in effect, a loan by the bank to Diemer of that much money. He could deal with it as he saw proper. He might have checked it out at once, and given the currency to Mr. Cousins. If, then, the latter had taken the currency back to the bank, and deposited it in the name of plaintiffs, and taken the deposit slip and the pass book, the rights of the parties would have been exactly the same. Yet in the latter case there could be no claim that the money was not deposited. Instead of pursuing that course, Diemer pursued the course that is adopted in the great mass of commercial transactions consummated through banks, and transferred the credit. Had there been no credit in fact given, and had Diemer received a deposit slip in his own name, and subsequently given plaintiffs a check for the amount with the deposit slip attached, then the case would come within *Bank v. Clark*, 134 N. Y. 368, 32 N. E. 38, cited by counsel, where the court declined to hold as a matter of law that anything was transferred. But the difference in the facts is so radical that the case can have no controlling influence here. To say that nothing was deposited is to say that no credit was given. But the cashier testifies that the credit was given. The difficulty lies in the fact that the promise upon which the credit was given was not fulfilled. The logic of defendant's position is to force the plaintiffs to bear the loss of its bad debts. Of course, the fact that plaintiffs might recover the shortage in a direct action against Diemer, or might recover on Diemer's bond to plaintiffs, cannot change the legal rights of the parties to this action.

The same general principles must govern as to the second deposit. Diemer went to the bank, and returned with a deposit slip in plaintiffs' favor for the exact amount due.

Same—Same—
Same—Loans.

Note

That amount was subsequently entered on plaintiffs' pass book. This raised a strong presumption that the deposit had been received. It was necessary for defendant to show that there had been a mistake somewhere. Nothing of the kind is pretended. True, they say Diemer had but \$111.98 to his credit at that time. But it is not claimed that he gave a check even for that, or that the bank intended to limit his credit to the amount on deposit. The bookkeeper testifies that the cashier said that the sum of \$131.67 was to be transferred to Andrews & Gage. By what arrangement Diemer secured this additional credit is not disclosed, but that it was by some arrangement with the bank is too clear for question. We find no error, and the judgment of the district court is affirmed. All concur.

WALLIN, J. I concur in the result announced in the majority opinion, but prefer to base my concurrence, under the facts recited, upon the ground that the defendant is estopped from denying liability to plaintiff.

NOTE.

Entry of Deposit in Pass Book—Effect—Parol Evidence.—The entry by a bank of a deposit in a pass book has only the effect of a receipt for money, and while it raises a presumption that the deposit was made, it is, nevertheless, open to parol explanation. *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545; *Talcott v. First Nat. Bank*, 53 Kan. 480, 24 L. R. A. 737, 36 Pac. Rep. 1066; *Comm. v. Reading Sav. Bank*, 133 Mass. 16, 43 Am. Rep. 495; *Asher v. Nat. Park Bank* (N. Y.), 7 Alb. L. J. 43; *Commercial Bank v. Rhind*, 1 Macq. H. L. Cas. 643.

In *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 163, the court said: "The bank book is no contract, and is only one of the means of indicating the state of the funds. Whatever presumption may arise from it, and whatever protection may be given to acts innocently done on that presumption, it cannot exclude explanatory evidence."

In Louisiana it has been held that the entry made by a clerk is binding on the bank, in the absence of fraud or collusion. *Hepburn v.*

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Citizens' Bank, 2 La. Ann. 1007, 46 Am. Dec. 564; Mechanics' Bank v. Banks, 11 La. Ann. 261.

In Manhattan Co. v. Lydig, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289, the court said: "I have said that particular errors in accounts may be inquired into and rectified, though the whole account may not be liable to be opened, with respect to accounts kept by individuals with a bank; but in my mind there is this exception: if the dealer's book accompany the deposits, and the credit be then given, when the deposit is made, it becomes an original entry, and would be conclusive on the bank; if, however, the book is sent to be written up afterwards, it is not an original entry, and may be examined into."

The depositor is not concluded by an entry made in his book by one of the bank's clerks. Mechanics' & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115. See also Schneider v. Irving Bank, 30 How. Pr. (N. Y.) 190, 1 Daly 500.

In Wasson v. Lamb, 120 Ind. 514, 6 L. R. A. 191, it was held that such entries, when made by the proper officer, bind the bank as admissions.

Where the receiving teller receives a check from a depositor and credits it on the depositor's pass book, and there are no funds to meet such check, the check may be returned and the credit removed, whether such check is on the same bank or another. Nat. Gold Bank & T. Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697. See also Crocker Woodworth Nat. Bank v. Nevada Bank (S. F. Sup. Ct.), 15 Bkg. L. J. 23.

RICHARDSON

v.

NEW ORLEANS DEBENTURE REDEMPTION CO., LIMITED.

(Circuit Court of Appeals, Fifth Circuit, May 29, 1900.)

Deposits—Fraud—Trust Fund.*—When a bank obtains a deposit by committing a fraud, as by receiving it after hopeless insolvency, the fraud prevents the money deposited from becoming the property of the bank, and it constitutes a trust fund in its hands.

Following Trust Funds.—Where such a trust fund has been created, the depositor may reclaim it as such in the hands of the bank's receiver, without showing that the identical money deposited went into his hands, if it is shown that the funds in his possession are increased by the deposit.

*See Richardson v. Denegre (C. C. A.), 1 Banking Cases 503, and note, p. 50b.

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APPEAL by defendant from the circuit court of the United States for the Eastern district of Louisiana. *Affirmed.*

W. C. Cochran (*F. L. Richardson*, on the brief), for appellant.

W. H. Rogers, for appellee.

Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The bill in this case was filed by the New Orleans Debenture Redemption Company, Limited, against F. L. Richardson, as receiver of the American National Bank, to collect \$1,658.60, which the company had deposited in the bank.

Case Stated.

The bill also embraced a claim for \$1,152, the proceeds of certain collections made by the bank for the plaintiff, but that part of the claim has been settled since the suit was brought. The company bases its right to recover the money on the alleged fact that the bank had received it as a deposit when it was hopelessly insolvent, and under such circumstances as to make the receipt of it a fraud. The facts averred and proved may be briefly stated: The American National Bank, a banking corporation organized under the laws of the United States, was on August 5, 1896, and prior to that time, engaged in a general banking business in New Orleans. On that day the bank was hopelessly insolvent, and had been so for a long time. Its condition was well known to its officers and managers. The appellee did not have knowledge of its condition. The appellee was a regular customer and depositor of the bank. When the bank opened on the 5th of August, 1896, it had in cash on hand \$15,897 54. Just before 3 o'clock on the same day, the appellee deposited in the bank \$83.60 in silver and \$1,575 in currency, making a total of \$1,658.60. The entire cash deposits received by the bank on that day amounted to \$6,934.76. It paid out during that day \$13,610.24. Just after 3 o'clock the bank closed its doors, and never reopened for business. The whole amount of cash in the bank after

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its doors were closed was \$9,722, \$500 of which was paid to the bank's attorney, and \$9,222 turned over to the bank examiner, who subsequently turned over the same to the receiver. Before receiving these funds the appellant had been duly appointed receiver of the bank by the comptroller of the currency of the United States. It is agreed that the books of the bank do not show how much of the cash which was turned over to the receiver was received by the note and collection clerk, or how much cash was received and not paid out by the receiving and paying teller, or how much of the cash turned over to the receiver was part of the original funds in the bank on the morning of August 5, 1896. There was a special meeting of the directors of the bank at 8:30 p. m., Wednesday, August 5, 1896, at which meeting the president of the bank stated what had taken place during the day, and that the deposits received during the day had been set aside. The directors at this meeting approved of this action, and instructed the president to hold said deposits separate and apart from the banking funds, and to examine carefully into the condition of the bank, and report at the meeting to be held at 8:30 a. m. on the 6th of August. The evidence, however, showed that the deposits in cash received on the 5th of August were not really kept separate. All of the money in the bank which had been received as general deposits, and which had not been paid out, appears to have been handed to the receiver at the same time. Many deposits were offered in evidence in the case, but it is not deemed necessary to state the evidence further. The circuit court (PARLANGE, District Judge, presiding) granted the relief prayed for in the bill. The decree is to the effect that the appellee have and recover from the receiver the sum of \$1,658.60. The decree is given priority over the unsecured creditors of the bank. The receiver has appealed to this court, and the decree is assigned as error.

Ordinarily, when funds are deposited in a bank, the relation of debtor and creditor immediately arises between the

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banker and the depositor. The money deposited becomes the property of the banker. He has the right to use it, but must pay the debt to the depositor ^{Deposits—Fraud}_{—Trust Fund.} by cashing his checks. When the banker obtains the deposit by committing a fraud, as by receiving it after hopeless insolvency, the relation between the parties is very different. The fraud avoids the implied contract between the parties that would arise in its absence, and, having barred contract, a trust is the equitable result. The fraud itself gives no lien. The fraud prevents the money deposited from becoming the property of the banker, and thereby prevents the relation of debtor and creditor arising between the parties. As the money does not become the property of the banker, it, of course, remains the property of the depositor. In the banker's hands, therefore, it is a trust fund,—as much so as if it had been a special deposit. The money which the banker has received in due course of honorable business before insolvency has become his property, and he the debtor of those who deposited it. Now, if the banker, having money in his bank, fraudulently receives other money, and mingles it with the moneys on hand, can the defrauded depositor reclaim his money? That is the question presented by this case. The bank received \$1,658.-60 of the appellee's money just before it closed. It was received under circumstances of fraud, so that it remained the property of the appellee. It passed with the other funds to the hands of the receiver; or, if the identical money did not so pass to the receiver, the sum turned over to the receiver was increased exactly \$1,658.60 by the appellee's deposit. This is clear, because if, after receiving the appellee's deposit and placing it with the general funds, payments were made out of the mass of money during the business of the day, it is immaterial whether the identical dollars deposited by the appellee were paid out or not. The amount that went into the hands of the receiver was, by the deposit of the appellee, increased to the amount ^{Following Trust}_{Funds.} of the deposit made by it. If we find that the trans-

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action between the appellee and the bank created a trust or lien on the funds of the bank with which the appellee's deposit was mingled, the trust or lien extended to the whole mass of money, and the paying out of part of it would not remove the charge from the remainder. The question, then, is reduced to this: If a banker takes \$1,000 not his own, and mixes the sum with \$10,000 of his own money, can the owner of the \$1,000 reclaim it? Has he, in equity, a charge on the whole to the amount of his money which has gone into it? Formerly, it was held that he had not. The equitable right of following misapplied money, it was said, depended on identifying it, the equity attaching to the very property misapplied. Money, it was said, had no earmarks, and the tracing of the fund would fail. This view was manifestly inequitable and unjust, and so, finally, it was held that confusion by commingling does not destroy the equity, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion of the fund a priority of right over the other creditors of the possessor and wrongdoer. This evolution of the doctrine of tracing trust funds is noticed incidentally by MR. JUSTICE BRADLEY in *Frelinghuysen v. Nugent*, 36 Fed. 229, 239. To create the trust it is not necessary to show that the identical money went into the hands of the receiver. It is sufficient if the funds in his hands are increased by the deposit. In *Bank v. Blackmore*, 21 C. C. A. 514, 516, 75 Fed. 771, 773, JUDGE TAFT, delivering the opinion of the circuit court of appeals for the Sixth circuit, said:

"It may not be necessary to show earmarks upon the proceeds of the thing parted with, to justify such a remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds; and the recovery is limited to the extent of this increase or benefit."

In *Association v. Austin*, 100 Ala. 313, 321, 13 South. 908, 909, McCLELLAN, J., delivering the opinion of the court, said:

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"We will concede that, so far as the right of the complainants to fasten a preference lien in the nature of a trust on the assets of the bank depends upon the fraud of the bank and its officials, their cases are made out on the facts we have stated. And if they had further shown that the identical money which was deposited by and collected for them, respectively, had come to the hands of the receiver, and was held by him in specie at the time of bills filed, or that their funds had been mingled with the funds of the bank which came to the receiver's hands, and constituted, in part, the gross sum held by him, or that their identical money had been invested by the bank in tangible property, which came to the hands of the receiver and was held by him, they would have been entitled to the relief they seek."

The observations quoted from the last two cases cited show why, in those cases, the trust was not declared. In *Quin v. Earle* (C. C.), 95 Fed. 728, 731, JUDGE GRAY presents a very interesting discussion of the question and an accurate statement of the correct rule:

"With regard to personal property other than money, the question of identification is generally easy of determination. Not so of money, and perhaps some personal property other than money. If these be confused in the mass of exactly similar things, specific identification becomes impossible. But the more modern doctrine has come to be that, where the fraudulent depositary so mingles goods which he has obtained by fraud with the mass of like goods of his own, the whole may be seized, or considered as held in trust, until equitable separation of the property of the defrauded party is made. So, advancing one step further, where money thus obtained has gone to swell the aggregate in the possession of the fraudulent party, it may, under proper proceedings, be segregated in amount from such aggregate sum, and made the subject of a trust, in order to accomplish the ends of justice. If my bushel of corn be obtained from me by fraud, and be poured into the mass of similar grain in the bin of the party committing the fraud, justice is

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satisfied, and no one can be wronged, by my having restored to me a bushel of the same grain out of the bin, though the identical grains obtained from me are not restored. If, on the other hand, the funds in possession of the defrauding bank be not increased by the property or the money so obtained, so that the aggregate amount of assets for distribution among the general creditors is not made larger by reason of the plaintiff's contribution thereto, then this extension of the doctrine of identification will not apply, and the complainant cannot have remedy as for a preferred claim."

SIR GEORGE JESSEL, master of the rolls, in the case of *Knatchbull v. Hallett*, 13 Ch. Div. 696, 707, reviewed the English cases on this subject. He shows the struggle of the able judges of the law courts over the earmarking of money, and that finally LORD ELLENBOROUGH throws over the doctrine as to money not earmarked not being followed. We cannot take space to cite and quote the many cases commented on by the master of the rolls. The opinion is marked by a keen sense of equity and strong common sense. On the direct point in question here he says:

"I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the 'trustee,'—using the term again in its full sense, as including every person in a fiduciary relation. Does it make any difference according to the modern doctrine of equity? I say, none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it."

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The supreme court, in an opinion concurred in by all the justices, quotes with approval the doctrine enunciated by the master of the rolls. MR. JUSTICE MATTHEWS, delivering the opinion, makes this endorsement of *Knatchbull v. Hallett*, *supra*, on the point here in question :

"But he [SIR GEORGE JESSEL] dissents from the application of the rule made by LORD ELLENBOROUGH, when the latter added, 'which is the case when the subject is turned into money, and confounded in a general mass of the same description'; for equity will follow the money, even if put into a bag or an indistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule." *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 69, 26 L. Ed. 693, 700.

There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money, in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds, and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has been so used. So, we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution. The decree of the circuit court is affirmed.

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v.

NEW ORLEANS COFFEE CO., LIMITED.

(Circuit Court of Appeals, Fifth Circuit, May 31, 1900.)

Title to Paper Deposited for Collection after Insolvency—Recovery of Proceeds from Receiver.*—Paper delivered to a bank by a depositor for collection and deposit at a time when its officers knew that it was insolvent, and which had not been collected when the bank closed its doors, remains the property of the depositor, although its indorsement to the bank was without qualification; and on its subsequent collection by the bank examiner its proceeds may be recovered from the bank's receiver, if the funds in his hands have been increased thereby.

Deposits—Fraud—Trust Fund.—When a bank, on the eve of insolvency, by committing a fraud obtains the money of a customer, and mingles it with the general funds of the bank, the title to the money does not pass; and if such money is not expended but kept in the bank, and turned over to its receiver, such money, or a like amount, although mixed with the general funds of the bank, can be recovered in a suit against the receiver; and the fact that the customer on the day the bank's doors were closed purchased worthless drafts from the bank and gave checks on the bank therefor almost equal in amount to the sum he had on deposit, could not affect such right of recovery, the rights of the bank's creditors not having been affected by such transaction.

APPEAL by defendant from the circuit court of the United States for the Eastern district of Louisiana. *Affirmed.*

The bill in this cause was filed in the circuit court of the United States for the Eastern district of Louisiana by the New Orleans Coffee Company, Limited, a Louisiana corporation, against Frank L. Richardson, as receiver of the American National Bank, a banking corporation organized under the laws of the United

Case Stated.

*See Richardson v. New Orleans Deb. Red. Co., L't'd. (C. C. A.), ante, and foot-note.

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States. It is shown by the bill that Richardson had been appointed receiver of the bank by the comptroller of the currency of the United States. On the 5th of August, 1896, the bank was doing business in the city of New Orleans, and on that day the New Orleans Coffee Company, Limited, in the usual course of business, deposited in the bank drafts on banks outside of the city of New Orleans aggregating \$610.06, checks on banks in the city aggregating \$146.82, and \$172 in currency, and a check on the American National Bank for \$25.78. Each check and draft was indorsed, "Pay to the order of the American National Bank." The evidence in the case shows that the checks and drafts were deposited for collection. The deposits were all entered in the pass book of the complainant, the New Orleans Coffee Company, Limited,—the out-of-town checks in one item, and the cash and the checks on the New Orleans banks in another. On the morning of August 5, 1896, the complainant had a balance in the bank to its credit of \$1,136.79; adding the deposits made that day, it had a total to its credit of \$2,091.45. On the same day the complainant bought of the bank two New York drafts, one for \$2,000 and the other for \$50, and gave to the bank its check for \$2,050. The complainant also drew checks on that day for \$10, \$17.05, and \$185. These drafts and checks were not paid. The bank closed its doors shortly after 3 o'clock that afternoon. The directors of the bank decided next morning not to reopen for business. The bank, at the time it received these deposits, was insolvent, and had been so for some days previous, and its condition was known to its officers. The cashier, at that time, was in New York trying to negotiate a loan to tide the bank over its difficulties. On the evening of August 5, 1896, at about 8 o'clock, the note and collection clerk of the bank received instructions to keep the drafts and checks received that day separate from the funds of the bank. The city checks so deposited were collected next morning. The out-of-town drafts and checks were afterwards collected by the

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bank examiner, who took charge of the bank before the receiver was appointed. After the receiver was appointed, the proceeds of all the checks and drafts and the cash in the bank were delivered to him. The currency so deposited was at once mingled with the funds of the bank at the bank teller's desk, and it served to increase the sum that went into the hands of the receiver. When the bank opened on the morning of August 5, 1896, it had on hand, as general deposits, \$15,897.54. The entire amount of cash deposited on that day—the last day the bank was open—was \$6,934.76, and the amount of cash on hand when the bank closed its doors, and which was afterwards delivered to the receiver, was \$9,222. This money is reserved, and is in the hands of the receiver. The check on the American National Bank for \$25.78 was charged to the account of J. W. Platt, and credited to the account of the complainant, and that transaction neither increased nor diminished the funds of the bank. After the return of the New York drafts for \$2,050 unpaid and dishonored, the complainant tendered them to the receiver, and demanded the return of his entire deposit of August 5th as a preferred creditor. The receiver refused to return the money, and the bill in this case was filed. The foregoing facts were alleged in the bill. It was also averred that the complainant was ignorant of the condition of the bank, and that the bank, in receiving the deposits when it was insolvent, perpetrated a fraud upon the complainant. The purpose of the bill is to rescind the purchase of the New York drafts, and to obtain a decree for the entire amount of the currency, checks, and drafts deposited by the complainant on August 5, 1896. The court below denied the claim for \$25 78, the amount of the check on the American National Bank, but entered a decree for the complainant in the sum of \$928.88, being the balance of the deposits made on August 5th, including the checks and the currency, and rescinded the transactions with reference to the New York drafts. From this decree, the receiver appealed

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to this court, and the decree, with the proper specifications, is assigned as error.

W. C. Cochran (*F. L. Richardson*, on the brief), for appellant.

Joseph P. Blair (*Denegre, Blair & Denegre*, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

All the money in dispute in this case except \$172 was collected on checks and drafts which the appellee deposited with the American National Bank. The checks and drafts were entered on the appellee's pass book, each having been indorsed, "Pay to the order of the American National Bank." There is evidence in the case showing that the checks and drafts were deposited with the bank for collection. The bank was then about to close. Its insolvent condition was known to its officers. At about 8 o'clock in the evening of August 5, 1896, the day the deposits were made, the bank officers instructed the note and collection clerk to keep the drafts and checks received that day separate from the funds of the bank. After receiving these checks and drafts, the bank closed its doors at about 3 o'clock on the same day, and was not again opened for business. The checks on the New Orleans banks were collected the next day, and later the drafts on the banks outside of the city were collected by the bank examiner, and the money was all placed in the hands of the receiver. The appellee claims that it has the right to recover this money because the absolute title to the checks and drafts did not, on the facts, pass to the bank; that, until they were collected, the relation between the bank and the depositor was that of principal and agent. The appellee also claims the right to recover the money because

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it was a fraud, on the part of the bank, to receive the drafts and checks as deposits in view of the hopeless insolvency of the bank, which was known to its officers. There is no trouble about tracing these funds. They were all collected after the bank closed its doors, and collected after the officers of the bank had given instructions that the checks and drafts received on August 5th should be kept separate from the general funds of the bank. The evidence shows that these funds went into the hands of the receiver, and are now held by him. We are therefore confronted with the plain question: Is the New Orleans Coffee Company, Limited, the depositor, equitably entitled to these funds, or is the receiver of the bank entitled to them? The receiver can, of course, only claim them for the benefit of the general creditors. His contention, then, is this: that although these checks and drafts were received after the bank was insolvent, and collected after its doors were closed, and the funds kept separate, he should now be permitted to take these funds, and mingle them with the other assets of the bank, and distribute them with the other assets among the general creditors. The argument is that this customer, the appellee, who dealt with the bank on the last day of its business existence, should fare no better than those who dealt with it previously. This view, however, cannot prevail, because the court must look at the special transaction between this appellee and the bank. If that transaction was such that the bank was only the agent of the depositor to make the collections, the funds, of course, never became the property of the bank, and they can therefore be reclaimed by the appellee. This comes from the fact that a fiduciary relation exists between the agent and the principal, making the former in equity a trustee, and the agent, of course, is not permitted to convert the funds of the principal. The principal is always permitted to recover his funds if they can be traced. It is equally true that a fraud on the part of the bank in procuring funds or in receiving checks and drafts for collection would have the effect of

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making the bank hold the checks or drafts or other proceeds in equity as trustee for the depositor. And, as in this case, when the funds can be traced, the depositor or owner of the drafts can recover. In *Richardson v. Denegre*, 1 Banking Cases 503, 35 C. C. A. 452, 93 Fed. 572, this court held that "checks delivered to a bank by a depositor for collection and deposit at a time when the bank was insolvent, as must have been known by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, and may be recovered by him from the receiver." It is true that the checks in the case just cited were indorsed "For deposit," and that in the instant case the indorsement was without qualification. The drafts and checks, however, were credited on the pass book of the appellee, and the evidence shows that they were delivered to the bank for collection. There was no intention by the transaction to create the relation of debtor and creditor before the bank made the collections. If there had been such intention, the fraud on the part of the bank would have defeated the intention, and preserved the fund for the depositor so long as it could be traced. The form of the indorsement, however, cannot be a matter of consequence or change the principles involved in a case where the litigation is between the original parties, no innocent holder of the paper having intervened. In *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363, a bank holding paper for collection passed into the hands of a receiver. The court held that the relation between the bank and the depositor as to uncollected paper was that of principal and agent, and that the money collected on the paper after the bank had closed, which had not been commingled with the general funds of the bank, could be reclaimed. The principle announced in that case sustains the decree of the circuit court in this case, for the reason that the bank was the agent of the depositor, and that a trust obligation was created by such agency. Morse states the rule that should govern in such cases :

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Recovery of
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"After a bank has suspended, it ought not to receive payments upon business paper previously deposited with it for collection, or, at least, not in such a manner that the money so received by it will pass into its general assets, and the owner of the paper will be placed in the position of one of its creditors, entitled only to take his dividend. * * * Proceeds received after the bank becomes insolvent are held in trust, and may be recovered in full." 1 Morse, Banks (3d Ed.) § 248a.

This view is sustained by many authorities, the facts varying in each case, but the principle being the same. *Levi v. Bank*, 5 Dill. 104, Fed. Cas. No. 8,289; *In re Havens*, 8 Ben. 309, Fed. Cas. No. 6,230; *Richardson v. Banking Co.*, 36 C. C. A. 307, 94 Fed. 442; *Same v. Bank*, 36 C. C. A. 315, 94 Fed. 450.

The other point made by the appellee is equally as conclusive. The fraud of the bank would prevent its obtaining title to the checks and drafts and their proceeds. In *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, the court held:

"When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits of checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds."

There can now be no doubt about the fact that it is well settled by authority that a bank should not continue business when it is known to its officers that it is hopelessly insolvent. The relation between a bank and its customers is such that great confidence is asked and reposed. A banker who knows that he is hopelessly insolvent cannot honestly continue business, and receive money from his customers. He may not intend to defraud a particular customer, but he will be held, of course, to have intended the inevitable consequences of his act,—that is, to cheat and defraud all persons whose money he receives and whom he fails to pay before he stops business. A banker who receives money or drafts for collection

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under such circumstances gets no title, legal or equitable, and the funds or proceeds can always be claimed and recovered by the owner when they can be traced and identified. On August 5, 1896, the day these drafts were placed in the hands of the bank, the appellee bought of the bank, drawing its check on the bank for the purpose, two New York drafts aggregating \$2,050. These drafts were worthless and were returned unpaid. The appellee also drew some small checks, which were also dishonored and unpaid. The appellant now insists that the purchase of these drafts and the drawing of these checks defeat the right of the appellee to recover the money sued for. The appellee offered to surrender the drafts to the receiver when it demanded the proceeds of its drafts and checks. The sale of these worthless drafts to the appellee was also a fraud. We cannot think that the perpetration of the latter fraud, the sale of the worthless drafts, can in any way relieve the bank of its liability for the perpetration of the first fraud, the receipt of the claims for collection. The evidence shows that the appellee had no contract to draw against the deposit of the checks and drafts. The appellee was solvent, and the bank had allowed it to overdraw. If the bank had been solvent and continued business, and had failed to collect the checks and drafts deposited with it, the appellee would have been required to pay for the New York drafts if they had been honored. The evidence shows that the purchase of the drafts was a transaction independent and separate from the deposit of the checks and drafts for collection. On the morning of August 5th, before the appellee made any deposits, it had to its credit in the bank \$1,136.79. This much more than covered the small checks drawn by the appellee on the bank, and leaves for consideration only the effect on this transaction of the purchase of the New York drafts, one for \$2,000 and the other for \$50. As these drafts were not paid, and as they did not diminish the funds in the bank or create any liability against it affecting the general creditors, we do not think it had any effect upon the equita-

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ble rights of the appellee. The entries on the books of the bank in reference to the purchase of these drafts was a mere matter of bookkeeping, and should not be permitted to affect the substantial rights of the parties.

The appellee was also entitled to recover the \$172 deposited in currency by it. The undisputed facts in the case show that this money, or its equivalent in cash, passed into the hands of the receiver. He either received the actual money deposited, or it served to increase the amount delivered to him. In the case of *Richardson v. Redemption Co.* (C. C. A.), 102 Fed. 780, we have recently handed down an opinion which deals with the question of tracing cash deposits. The case is, on its facts, almost identical with the instant case, so far as the deposit of cash is involved. It is sufficient to say that when a bank, on the eve of insolvency, by committing a fraud obtains the money of a customer, and mingles it with the general funds of the bank, the title to the money does not pass; and if the money is not expended, but kept in the bank and turned over to the receiver, the money, or a like amount, although mixed with the general funds of the bank, can be recovered in a suit against the receiver. The circuit court was right in deciding that the appellee could recover the proceeds of the checks and drafts and the cash deposited. The decree of the circuit court is affirmed.

JAMES CLARK CO. *et al.*

v.

COLTON *et al.*

(*Court of Appeals of Maryland, April 27, 1900.*)

Banks—Insolvency – Fraudulent Preferences. —In an action to have certain payments made by the defendant bank declared fraudulent preferences, it appeared that the bank, when such payments were made, had been insolvent for years, and was hopelessly insolvent at

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the time of the payments, or immediately following thereupon. *Held*, that it must be concluded that the payments were made when the bank was insolvent, and about to close its doors, and when its officers were chargeable with notice of its condition.

Same—Same—Knowledge of Officers.—The law imputes to one who is the president and director of a bank knowledge of its condition; and neither he nor its other officers can be given, in such an action, on account of their wilful ignorance a better standing than if they had actual knowledge of such condition.

Jurisdiction—Collateral Inquiry.—It was urged that the bill which was filed in the original case, in which receivers were appointed and the dissolution of the defendant bank decreed, and under which proceedings were first commenced against the bank, was not filed under the provisions of sections 264, 264a, art. 23 of the Maryland Code, and, relating to the dissolution and winding up of insolvent corporations; and that, therefore the court below had no jurisdiction to decree dissolution, and that the insolvent law had no application to the case. *Held*, that such question, presented as it was in a collateral way, and by some of the parties at whose instance the decree objected to was passed, did not merit favorable consideration.

Same—Preference of Officers—Fraud.—Where a bank has been insolvent for years, and is hopelessly insolvent on the day after the payment of its president's check and notes upon which its officers are indorsers, when such officers are chargeable with notice of its condition, such payments are illegal preferences and frauds upon its creditors, although it was a going concern when they were made, and may be recovered from such officers by the bank's receivers.

APPEAL by defendant from Baltimore city circuit court.
Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, BRISCOE, SCHMUCKER, and JONES, JJ.

Robert H. Smith and Gans & Naman, for appellants.

Wm. S. Bryan, Jr., and *Martin Lehmayr*, for appellees.

FOWLER, J. The questions we are to consider grow out of the failure of the South Baltimore Bank, which, by a decree of the circuit court of Baltimore city, passed on the 1st of June, 1898, was declared insolvent, and dissolved. By the decree just mentioned the ap-
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pellees Messrs. Colton and Schott were appointed receivers, with the usual powers given to such officers, and also with

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power to wind up, under the court's direction, the affairs of the bank, in conformity with the provisions of article 23 of the Code of Public General Laws in so far as the same apply to the liquidation of the affairs of insolvent corporations through the agency of receivers, and to that end they were authorized to exercise and have "all the title, power, and authority" which it is declared by the said provisions of article 23 shall be conferred upon or vested in receivers appointed by the court of the estate or effects of corporations. In the exercise of the powers thus conferred upon them they brought two suits in the same court by the decree of which they were appointed; one against the James Clark Company, a body corporate, and Winfield S. Cahill, and the other against Cahill, Norman H. Storey, and Walter L. Denny. The first bill asked that the payment of a check of the James Clark Company on the South Baltimore Bank for \$10,000 be declared a fraudulent preference, and the prayer of the second bill was to the same effect in reference to the payment of a note of said bank for \$5,000, held by the Citizens' National Bank, and indorsed by Cahill, Storey, and Denny. The defendants named in both bills answered, fully denying all fraud. Testimony was taken, and the court below found that both these payments were unlawful and fraudulent preferences. A decree was passed accordingly (the two cases having been consolidated by the agreement of all parties), and from that decree this appeal was taken.

There are but three questions in the case, only two of which require consideration, although at the hearing a number of other questions were discussed in a most interesting and able manner. The questions we are to consider are whether, under all the circumstances of this case, the payments above referred to were made by the South Baltimore Bank—that is to say, by its officers and agents—at a time when it was insolvent, and about to close its doors; secondly, whether the payments thus made, when the corporation was insolvent in fact, by such officers, of their own claims, to the exclusion of and to the detriment of other creditors of the bank

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are unlawful preferences within the meaning of the insolvent law; and, third, whether, apart from the insolvent law and sections 264, 264a, art. 23, Code, the payments made under the circumstances these were made will be declared by a court of equity to be consistent with a fair, equitable, and just distribution of the assets of an insolvent corporation.

The first question is one entirely of fact, and is fully answered in the affirmative by the testimony. Indeed, it is conceded all the way through the case that the bank had been insolvent for several years. The evidence shows without contradiction that, in addition to this

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long-continued state of insolvency, the bank became hopelessly insolvent at the time when these payments were made, or immediately following thereupon. There is no denial of either condition of insolvency; but the officers, especially the defendants Cahill, Storey, and Denny, who got the benefit of the payments, place their defense on their denial of knowledge of the bank's insolvency. We are forced to the conclusion, however, that, if the bank is conceded to have been insolvent for years, its officers must have known it, and that, if it was hopelessly insolvent on the 23d, they knew, or ought to have known, it on the preceding business day, when the payments were made. We have not overlooked the fact that Mr. Cahill and his co-indorsers have denied that they had any knowledge of the insolvency of his bank at the time the payments were made. The fact that

Same—Same—Knowledge of Officers.

he was, as he said, only president in name, may, to some extent, account for his want of that accurate knowledge which he should have had. As president and director of such a financial institution, the law imputes the requisite knowledge, and neither he nor they can be given on account of their willful ignorance a better standing than they would have had if they had performed their duties. *Corbett v. Woodward*, 5 Sawy. 416, Fed. Cas. No. 3,223; *McDaniel v. Harvey*, 51 Mo. App. 205; *Sicardi v. Oil Co.* (Md.), 24 Atl. 164; *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 626, 17 S. E. 968; *Roan v. Winn*, 93 Mo. 511, 4 S. W. 736.

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2. It was urged with a good deal of force that the bill which was filed in the original case in which receivers were appointed and dissolution decreed, and under which proceedings were first commenced against the South Baltimore Bank, was not filed under the provisions of sections 264, 264a, art. 23, relating to the dissolution and winding up of insolvent corporations; that, therefore, the court below had no jurisdiction to decree dissolution, and that the insolvent law has no application to this case. Section 264, just referred to, provides that "whenever any corporation in this state shall have been determined by legal proceedings to be insolvent, or shall be proven to be insolvent by proof offered under any bill filed under the provisions of this section, it shall be deemed to have surrendered its corporate rights, * * * and may be adjudged to be dissolved after hearing, according to the practice of courts of equity in this state, upon a bill filed for that purpose," etc. And section 264a, among other things, provides "that whenever such corporation shall have been adjudged to be dissolved as provided in the next preceding section of this article, all of its property * * * shall be distributed * * * in the same manner" as is required by our insolvent laws (article 47, Code Pub. Gen. Laws). And this section further provides that the receivers so appointed of such corporations shall have the same powers to bring suits and to set aside transfers, payments, and preferences made by the corporation, or by any of its officers on its behalf, as the permanent trustee of a natural person who is an insolvent debtor has under the insolvent law of this state. It was contended that the bill in the original case does not specifically ask for dissolution, and that, therefore, it must be held not to have been filed either for that purpose or under the sections mentioned. It does, however, ask not only for the appointment of receivers, but also that the bank (a corporation) be declared insolvent. It prays for the "winding up" of the corporation by the distribution of its assets among the stockholders should anything remain after

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the payment of debts, and for general relief. The act of 1896 (chapter 349) was passed to bring corporations within the provisions of the insolvent law, and to give courts of equity power to declare them insolvent, and dissolve them. But, as we have said, the decree shows the purpose of the bill. But, aside from any other view, it would seem to be beyond the power of these defendants in this case to deny the validity of the decree dissolving the South Baltimore Bank. It is true they do not make a direct attack upon the decree, nor deny the jurisdiction of the court to pass it. But the contention is that the bill was not filed for dissolution nor for winding up under sections 264, 264a, art. 23, and that, therefore, the court was without jurisdiction to entertain this bill, and hence the insolvent law has no application. The decree, however, provides that the estate and assets of the bank shall be administered according to that law, and that the receivers shall have the same powers as to setting aside illegal preferences which are thereby given to permanent trustees. Now for the first time it is suggested that the dissolution decree is not to have full force and effect. No such suggestion was made when that decree was before us in the case of *Colton v. Association* (Md.), 45 Atl. 23, and *Same v. Mayer* (Md.; decided last Jan. term, and not yet officially reported), 45 Atl. 874. On the contrary, the receivers relied upon that decree to show that the extent of their powers was the same as that of permanent trustees under the insolvent law; and in the former case the opinions of this court assume that the proceedings were under section 264a, and in the latter declare that the receivers were acting under that section. Indeed, ever since the date of that decree—June 1, 1898—declaring the South Baltimore Bank insolvent and dissolved, its affairs and estate have been administered by the receivers without objection from any quarter under the provisions of the insolvent law. It is perfectly obvious that all interested were in fact acting under the provisions of sections 264, 264a. The decree is conclusive upon this point. It was passed without objection, if not with the implied consent of all par-

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ties. If the intention had been unquestioned to proceed under those sections, and counsel had been instructed so to file the bill, but had omitted to add the three words "they pray dissolution," can it be supposed for a moment that any serious difficulty would have arisen from this omission? If attention had been called to it in the court below, the bill would have been amended in that respect. No objection on the ground of defective averments of the bill, nor any objections based on want of jurisdiction, could have been taken in this court by the defendant. In addition to this, if the bill now before us be regarded, as we think it may be, as a bill filed to carry into execution the dissolution decree, the law of the latter is not examinable, and will be enforced unless attacked by bill of review. *Tomlinson v. McKaig*, 5 Gill 256-278. We do not, therefore, feel inclined favorably to consider this question of jurisdiction, presented as it is in this collateral way at this late day, and by some of the parties, too, at whose instance the decree now objected to was passed. In *Hayes v. Brotzman*, 46 Md. 519, it was contended, as in the case at bar, that it did not appear from the record that the bill was filed under the provisions of the general incorporation law (Acts 1868, c. 471), and that, therefore, the receivers could not rely upon section 195 of that act (now codified as section 274 of article 23, Code) for authority to sue; but this court said that the order of the circuit court appointing receivers of the property and effects of that corporation, being the order of a court of competent jurisdiction to pass it, carried with it the presumption of regularity. Unless, therefore, the decree appointing these receivers and declaring the bank insolvent be successfully attacked in some direct and proper way other than in this collateral manner, it must stand, and these appellees have a right to rely upon section 174, which expressly provides that receivers appointed as they were, and with the powers they have, shall have authority to sue in their own names. In the case just cited it was held, therefore, that whether the order appointing the receivers authorized them to sue or not was immaterial, for their authority to do so is

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ample under section 195, c. 471, of the act of 1868, which is the same as section 174 of article 23 of the Code. But, in addition to this, the decree we are considering declares they shall have "all the title, power, and authority" which by the provisions of article 23, are conferred upon or vested in receivers appointed by the court of the estate or effects of corporations. See, also, section 239 of article 23. If, therefore, the decree stands, then, under section 264a, these receivers have authority to maintain suits to set aside preferences by insolvent corporations in the same manner and to the same extent as the insolvent law gives to the permanent trustee of a natural person who is an insolvent debtor. It can hardly be contended that the preferences which are here so earnestly defended would be held valid under the provisions of section 22 of article 47, which prohibits preferences of every kind made when insolvent or in contemplation of insolvency. The fact that the bank, which is conceded to have been insolvent for several years, and shown to have been hopelessly insolvent the day after the payments, had not actually suspended payment of its negotiable paper, and therefore had not committed that act of insolvency, has no tendency to prove that it had not made any of the unlawful preferences prohibited by law. The case of *Improvement Co. v. Terrell*, L. R. 10 Eq. 175, bears directly upon this aspect of the case, for the English statutes in respect to unlawful preferences are very similar to the provisions of our insolvent law, which, as we have seen, are adopted by section 264a of article 23. In disposing of this case LORD ROMILLY, M. R., said: "The directors of the company think fit to pay themselves. It is to be observed that the directors of any company who are also creditors fill two distinct and antagonistic characters. In the first place, they are trustees for the benefit 'of the company, and are trustees for the creditors to that extent.' They are bound to apply all the assets for the benefit of the creditors as far as they will extend. They themselves are also creditors, and have an interest to have their own debts paid. Now, if they had themselves passed a resolution to

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pay A. B., who was not a director, but a stranger to the company, nobody, in my opinion, would be found to assert that that was not a fraudulent preference, the creditor having done nothing, having made no application for the payment. Is the case altered by the fact that the creditor is one of the directors? So far from that being the case, in my opinion it only adds a breach of trust to the fraudulent preference." It will be observed that the conclusion reached by LORD ROMILLY in the above case is not based on the so-called "trust-fund doctrine" as adopted in this state (*Fear v. Bartlett*, 81 Md. 322, 32 Atl. 322), by which it is held that when a corporation has been dissolved, or has committed an act which by law is an act of insolvency, its entire property becomes a trust fund for the payment of its creditors in preference to the claims of stockholders.

3. This brings us to a consideration of the merits of the case. We are not willing to adopt the view, which was so forcibly presented, that the payments here attacked as fraudulent preferences are free from fraud, and should be protected by a court of equity. On the contrary, our view is that whether the estate of the insolvent bank be administered under the insolvent law or according to the rules which govern courts of equity is immaterial, for, in either case, as we have seen, the rule of distribution is the same, and that rule requires fairness and equality, and prohibits favor and preference. Assuming, therefore, that we have already shown that these payments were made to the officers of the bank when it was insolvent, and about to close its doors, and that, therefore, they are illegal preferences under the insolvent law, we will proceed to discuss the question whether, apart from the insolvent law, a court of equity will recognize them as fair and equitable payments. In the case of *Finch Mfg. Co. v. Stirling Co.* (Pa. Snp.), 41 Atl. 294, decided by the supreme court of Pennsylvania in 1898, the preferred creditor, as in the case before us, was a president and director in both the debtor and creditor corporations. The court said: "Although hampered by debts, it did not follow that the company was

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insolvent. Statutory insolvency is generally determined as an inability to pay its debts when due or demandable; but the rule that an officer or director of an insolvent corporation cannot prefer his individual debt is based, not on statutory insolvency, but on the unfair and fraudulent character of the transaction. He is a trustee of the corporate property for the benefit of all creditors and stockholders, and has superior knowledge of the financial condition of his company. It would be highly unjust to permit him to use his position for his individual interest to the prejudice of others.' Before proceeding further with the discussion of this branch of the case, it must be remembered that it is a conceded fact that when Mr. Schott examined the statement of the affairs of the bank on the afternoon of Wednesday, the 23d of February, he found it hopelessly insolvent. It is also conceded that it had been in an insolvent condition for several years. This being so, it is useless to consume time to show the condition of the bank when the payments were made, and it follows that its then condition must have been known to its officers when Mr. Cahill took care of himself and his friends and co-indorsers. Mr. Cahill was practically the owner of the James Clark Company, as he owned all except four shares of its stock, which four shares were in the hands of others in order to have a legal organization. If there was any difference as to the degree of insolvency of the bank between the 21st February, when the payments were made, and the succeeding business day, when it is conceded to have been hopelessly insolvent, that difference must have been caused by the withdrawal of over \$15,000 by Mr. Cahill to make the payments just mentioned. In the case of *Fear v. Bartlett*, 81 Md. 322, 32 Atl. 322, it is said that, "so long as the company is a going concern, having possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals." And again it is said that the trust-fund doctrine has no application until proceedings

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in insolvency have been instituted, or some act done that in law is regarded as an act of insolvency. If the conclusion we have already reached be correct, namely, that the bank was insolvent at the time the payments were made, such payments must, we think, be regarded as unlawful preferences, and therefore as acts of insolvency. As we have seen, it is conceded the bank was and had been insolvent for some years, yet it is denied that this condition was known to its officers, and that, therefore, it was impossible for them to have violated the law. But we think the evidence shows the very payments here objected to were made in contemplation of insolvency, not, perhaps, of the mild type of insolvency which appears to have been the normal condition of this bank, but in contemplation of that hopeless insolvency which supervened upon, and was doubtless caused by, the payments. In the case of *Van Wageningen v. Bank*, 10 N. J. Eq. 16, the chancellor says in regard to similar preferences: "If the legality of this transaction can be maintained, then it follows that, after a bank has become so hopelessly insolvent that the directors have been forced to the conclusion that it is incumbent upon them at once to close the doors of the bank, and abandon the objects for which the institution was incorporated, they may employ the last half hour of existence in parceling out to favorite creditors the few remaining assets of the bank still within their control. Nay, it follows that the cashier of the bank may, after the directors have declared the bank insolvent, and have determined to notify the public of its insolvency, before the directors can reach the door to post up such notice, dispose of the assets at his pleasure to the creditors of the bank; for this is not the case contended for by counsel that the cashier of a bank may lawfully meet all demands made upon it up to the moment the bank suspends payment. This he may do under ordinary circumstances. * * * But can he stand behind the counter, and, while he is dealing out to unfortunate creditors their legal demands with one hand, with the other place assets of the bank in his pocket for

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absent friends and favorites?" Of course, the picture here drawn is not an exact representation of the situation now before us, but it clearly shows what may result if we sustain the positions which have been so ably supported by counsel for the appellants. Instead of equality among the creditors of a hopelessly insolvent corporation, we should have the most glaring inequality; and not only the main object and purpose of our insolvent laws would be defeated, but, as we think, every rule of fair dealing would be violated.

It was said in *Construction Co. v. Fitzgerald*, 137 U. S. 110, 11 Sup. Ct. 36, 34 L. Ed. 608, speaking of loans made by an officer and stockholder to a corporation, that: "Undoubtedly his relation as a director and officer or as a stockholder of the company does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company, as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." In section 861 of 2 Cook, Stock, Stockh. & Corp. Law (page 938), the author, after quoting the foregoing sentence, says: "But, where the corporation is insolvent, an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay a debt due to a director in preference to debts due others, either by turning over property or cash to him, or by giving him a mortgage on corporate assets." The contrary doctrine, we know, has been held by a number of tribunals for which we have the highest respect, but we do not feel justified in extending this opinion to the length which would be required to cite and comment upon that line of cases. They will be found collected in the recent case of *Corey v. Wads-*

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worth (Ala.), 25 South. 503, 44 L. R. A. 766. See, also, *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex. Sup.), 22 L. R. A. 802 (s. c. 24 S. W. 16), where the conflicting decisions are reviewed in a note to that case. In many of the cases which hold that an insolvent corporation may legally and fairly pay its officers as preferred creditors the well-known rule applicable to natural persons is adopted,—that is to say, unless there is some statutory prohibition, a corporation has the same right to prefer its friends and officers that an individual has to prefer his friends and relatives,—and that preference as applied to corporations as well as individuals is altogether a matter of favor, and is not based on any equitable principle whatever. We cannot assent to a doctrine fraught with such dangerous consequences. In our opinion, a much wiser and safer rule is that announced by the court in the case of *Manufacturing Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 501 (JUSTICE HARLAN), that no preference will be allowed unless authorized by statute, or legally given by the corporation. As has been frequently said, a very large proportion of all the business of every kind in this country is done by corporations, and their creditors are, like themselves, found everywhere. It requires but little foresight, however, to predict that, if it be announced by courts of equity that corporations insolvent, or in contemplation of insolvency, or in failing circumstances, may pay the debts of their officers as preferred creditors, neither general creditors nor stockholders will have any redress. With such protection as this view will afford the president, directors, and other officers, and stockholders who are creditors, secured as they will be by all the assets of the corporation, they may and will enter into fields of the wildest speculation without the fear of loss to themselves. They may loan, and have a right to loan, their money to the corporation, and in violation of their duty they may speculate with it in the corporate name. If losses result, the stockholders and creditors must bear them, for the president and directors either take

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the money of the corporation to make themselves whole, or secure themselves by transfers and assignments of corporate property. Such payments or transfers, unless void for some other reason, must, according to the contention of the defendants, be held good whether the corporation be solvent or insolvent. In our opinion, fairness and justice require that the officers should be placed on an equality, and no more than an equality, with the other creditors of the corporation. And so, in the case of *Manufacturing Co. v. Hutchinson*, *supra*, HARLAN, J., says: "It is, we think, the result of the cases that, where a private corporation is dissolved, or becomes insolvent, and determines to discontinue the prosecution of business, its property is affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and, necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors." We refer also to *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378; *Richards v. Insurance Co.*, 43 N. H. 263; *Drury v. Cross*, 7 Wall. 302, 19 L. Ed. 40; *Bradley v. Farwell*, 1 Holmes 433, Fed. Cas. No. 1,779; *Montgomery v. Phillips*, 53 N. J. Eq. 203, 31 Atl. 622; *Corbett v. Woodward*, 5 Sawy. 417, Fed. Cas. No. 3,223; *Sicardi v. Oil Co.*, 24 Atl. 164, 149 Pa. St. 148. See, also, 2 Mor. Priv. Corp. § 787, and notes, for collection of authorities; 2 Cook, Stock, Stockh. & Corp. Law, § 661, and notes.

In concluding what we have to say upon this question we will refer briefly to several of our own decisions which we think are based upon the same salutary doctrine we adopt in this case. In the case of *Hoffman Steam Coal Co. v. Cum-*

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berland Coal & Iron Co., 16 Md. 456, the then court (LE GRAND, C. J.) rigorously applied to the officers of a corporation dealing with it the same rules that a court of equity will apply to the dealings between a trustee and his *cestui que trust*. Insurance Co. v. Dalrymple, 25 Md. 266. And in Iron Co. v. Parish, 42 Md. 598, the strict rule is again applied to the officers of a corporation. "The affairs of corporations are generally intrusted to the exclusive management and control of the board of directors; and there is an inherent obligation implied in the acceptance of such a trust, not only that they will use their best efforts to promote the interests of the shareholders, but that they will in no manner use their positions to advance their own individual interest as distinguished from that of the corporation, or acquire interests that may be in conflict with the fair and proper discharge of their duty." Certainly one of the interests of every corporation is that, while solvent, all its creditors should be fully paid, and, when insolvent, that all its assets should be equally divided, and not awarded by the president and directors or other officers to themselves and their friends. While the exercise of this right of preference by insolvent corporations has been justified by the fact that courts generally concede it to natural persons when not prohibited, yet there is no real analogy between the two cases. In the latter the individual freely and voluntarily confers the favor upon another, while in the former the persons by whom the corporation can alone act confer the favor upon themselves. There is nothing equitable in such preferences, whether exercised by an individual or by a corporation, and so long as it is not expressly conferred upon corporations, and is neither incident to nor necessary to the accomplishment of any of their ends, and is so productive of unfairness and fraud, it should not, in our opinion, be given to them by implication. But again, is it not settled that so soon as the corporation becomes insolvent, and when it is contemplating insolvency, its directors become trustees for all the creditors? If this be so, how can these very officers forget

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their duties as trustees, and appropriate to their own use the fund which the law has wisely dedicated to the equal payment of the creditors? It would be folly to hold that the trust-fund doctrine has no application except where an act of insolvency has been committed and the powers of the insolvent court have been actually invoked. It seems clear to us that, if this doctrine is to have any efficacy, it must be held to apply to a case like this, where, as we have seen, the payments were made when the corporation was actually insolvent and under circumstances which convince us that the directors know or were bound to know the bank was hopelessly insolvent, and would, as it did, the very next business day after the payments were made, close its doors, and deny admittance to its depositors who wished to withdraw their deposits.

The payment of the \$5,000 demand note of the South Baltimore Bank held by the Citizens' National Bank, and indorsed by Cahill, Denny, and Storey, it seems to us, was as much a breach of trust and violation of duty, so far as the indorsers are concerned, as was the payment of the \$10,000 note directly to Cahill. They were all directors, and if (as it was) their bank was then insolvent they held its assets as a trust fund to be fairly and equally distributed among all the creditors, and it was a clear breach of trust to pay this note in full, and thus relieve themselves from the obligation they had assumed. If the directors, the bank being insolvent, and about to close its doors, had met, and passed a resolution to pay this note, in order to relieve the indorsers from loss, can there be any doubt that such payment would be held a preference, as to them? As was said in Mayer's Case, *supra*, the receivers may sue for and recover assets, and may maintain suits to set aside preferences, even when the corporation could not do so which have been disposed of contrary to law. We see no good reason, therefore, why they may not also sue the indorsers on a claim from which they have been ille-

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gally and fraudulently released. Under section 269, art. 23, apart from section 264a, they are vested with all the estate and assets belonging to the bank, and are declared to be trustees of the creditors and stockholders, with all the powers necessary to wind up the affairs of the corporation. In the case of *Willison v. Bank*, 80 Md. 198, 30 Atl. 749, it was held that the payment of certain notes by the insolvent to relieve the indorser from his liability on them was an illegal preference as to him, and the insolvent trustee was allowed to recover from the indorser the amount of the notes so paid. It was contended that not only this note, but also the check for \$10,000 of the Clark Company, was paid in the ordinary course of business; but in the face of the facts which we think are established by the testimony this view cannot prevail. The check was paid by Cahill, as we have seen, to himself, when he was bound to know the bank was insolvent; and the demand note was paid without the asking; therefore without demand, and voluntarily, and before it was due. 2 Morse, Banks, § 625; *Willison v. Bank*, *supra*. So far from this being a payment in the ordinary course of business, a payment forced from a debtor by an unfortunate creditor, it was a voluntary preference in favor of Cahill and the other indorsers. *Van Wagenen v. Bank*, *supra*.

It is unnecessary further to consider the question how far a court of equity, under its general jurisdiction, apart from section 264a, has power to appoint receivers to take possession of the assets, and wind up insolvent corporations. In *State v. Northern Cent. Ry. Co.*, 18 Md. 193, it is said it is not against public policy to appoint receivers for property of corporations when, through fraud or other cause, the property would otherwise be in imminent danger of loss to those interested. This same doctrine has been frequently announced by this court. Thus, in the recent case of *Davis v. Light Co.*, 77 Md. 41, 25 Atl. 982, where insolvency was not alleged, it was held that, if the directors were pursuing a fraudulent policy, which would ruin the company, receivers would be appointed. But this question is not important, for, however

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defective the averments of the bill in the original case may be, as was said in *Hayes v. Brotzman*, *supra*, the decree in the case under which these receivers are acting, being a decree "of a court of competent jurisdiction to pass it, carried with it the presumption of regularity. It was not necessary, as contended by the appellee, that the appellant should have gone further, and offered proof that the circuit court had acquired jurisdiction to pass the order by proper averments in the bill." If, therefore, that decree be binding, the assets of this insolvent corporation will be distributed according to "the principles of equity," whether under the insolvent law, as provided by section 11, art. 47, or under the rules regulating a court of equity; in either case the rule of distribution being the same. Affirmed, with costs.

SCHMUCKER, J. I concur in the conclusion reached by the majority of the court in this case because, in my judgment, the payment by the South Baltimore Bank of the \$10,000 to the James Clark Company, and that of the note for \$5,000, on which certain of its directors were sureties, were made at a time and under circumstances when its directors must, in equity, be treated as having become trustees for its creditors; and, as the payments were made to or for the benefit of certain of the directors, they constitute such preferences as should not be upheld. The cases which have discussed the trust-fund doctrine as applied to corporate assets have been so fully cited in the opinion of the majority of the court and the dissenting opinion of the learned Chief Justice that it would serve no good purpose to cite them again in this one. Many of these cases, in defining the doctrine, use broad language, and deny the right of directors of a corporation to take advantage of their position at any time to obtain preferences for themselves, or for their unsecured debts. Other cases define it more strictly, and say that only where a corporation has been lawfully dissolved, or has become insolvent, does its property become a trust fund in the hands of its directors for the payment of its debts; and that, so long as it is a going concern, having possession and management of its

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property, its transactions made *bona fide* in the ordinary course of its business will be upheld, whether they be made with its own directors or with strangers. The decided majority of the cases, when closely examined, will be found to sustain the proposition that so long as the affairs of a corporation, even if its assets do not equal its liabilities, are in such condition that its creditors may fairly and reasonably expect it to continue its business, and become extricated from its difficulties, they may lawfully continue its current transactions, and pay its debts to themselves or to others as they fall due. But so soon as it becomes apparent that the corporation cannot longer safely conduct its business, the directors become trustees of its assets for all of the creditors, in so far, at least, that they cannot prefer themselves in their distribution. It would be both irrational and dishonest to say that the directors, after it has become plainly apparent that the corporation must stop, may keep it going for a few days longer, until they can procure its debts to themselves to be paid, and then defend their action upon the pretense that the corporation was a going concern at the time when the payments were made.

The main purpose of the present opinion is to state somewhat more fully than is done in the majority opinion the facts which seem to me to call for the application of the trust-fund doctrine to the assets of the South Baltimore Bank at the time when the controverted payments were made. The record plainly shows that the bank was then, and for several years prior thereto had been, actually insolvent. It also shows that the fact of this actual insolvency, if not apparent upon the face of the bank's books, was so easily ascertainable by a slight examination into its affairs, that the directors may fairly be held chargeable with knowledge of it, and its probable consequences. Monthly statements of the assets and liabilities of the bank were currently made, and several of the statements showing its condition at and about the time of the payments in question appear in the record. These statements are identical in their important items, and all of

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them show that the bank's capital of \$28,500 was impaired to the extent of more than one-half. They further show that more than the entire remaining capital, amounting to \$12,053.91, was locked up in real estate, that a still larger sum was in mortgages, and that \$4,115.30 was represented by unsatisfied judgments. In fact, the only way the monthly statements were made to balance was by placing among the liabilities the capital stock at but \$12,053.61, instead of \$28,500, which was the true amount of stock then outstanding. A slight inquiry into the nature and value of the assets appearing upon these statements would have disclosed the utter insolvency of the bank. The real estate, which appeared thereon at \$13,213.54, was of little value, and brought but \$3,725 when sold. The mortgages, valued in the statement at \$14,654, yielded less than half that amount; and one of the judgments was against an insolvent. The record shows affirmatively that on the day after the two payments in question were made some, at least, of the directors were aware of the low value of these assets. Now, with the bank and its accounts in this condition, Simon P. Schott, who was the cashier of the American National Bank, and an experienced bank officer, on February 19, 1898, met Cahill, the president of the South Baltimore Bank, at its office, by appointment, for the purpose of ascertaining the condition of that institution, in order to determine whether he would be justified in asking some of his friends to furnish it additional capital. At this interview Schott was furnished by the officials of the bank with statements of its condition, including one or more of the monthly statements already described in this opinion. About two hours was spent in this interview, as Schott says, "talking about the statement," which was at that time criticised by him. He called Cahill's attention to the erroneous character of the entry debiting the capital stock at but \$12,053.61, when there was \$28,500 of it outstanding, for which the bank had received par value in money, and warned him that the entry would not be passed by a bank examiner if the state should adopt a plan then

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under consideration of requiring a periodical examination of state banks. On the following Wednesday, February 23d, in the afternoon, Cahill and others of the directors of the South Baltimore Bank called upon Schott, at his request, at his office, having with them a statement of the condition of the bank. Schott says that his purpose in requesting Cahill to bring the other directors with him was to verify the statement of the bank's condition as to the worth of the assets. He further says: "When we came together, I asked about the various securities, or, rather, the various sums of money appearing as assets in the form of real estate and judgments, and the answers received satisfied me conclusively that the bank was in a hopelessly insolvent condition, and so stated to the gentlemen present." Schott then expressed the opinion to the directors that they would be both morally and criminally liable if they continued the bank's business knowing that it was insolvent. The directors had another conference that evening, and as a result thereof they applied to the circuit court the next morning for the appointment of a receiver and a liquidation of the bank's affairs. As Sunday and Tuesday, the 22d of February, were holidays, there were but two business days between the meeting of Schott with Cahill on Saturday and his meeting with the directors on Wednesday afternoon. During those two business days the debt of \$10,000 to the James Clark Company, of which Cahill was substantially the sole owner, was paid, as was also the call loan of \$5,000, for which he and others of the directors were sureties. It is unnecessary to repeat in detail the steps by which these payments were accomplished. It is sufficient to say that they manifest an intelligent purpose, and show an active participation on the part of Cahill. Cahill, in the meantime, on either Monday or Tuesday had gone to the office of counsel, and given directions for the preparation of a general assignment by the bank for the benefit of its creditors. As over against the very pregnant circumstances which have just been narrated it must be said that Cahill and several of his co-directors testify that they

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were ignorant of the bank's insolvency until informed of it by Schott on the afternoon of the 23d of February, and Schott says that he did not express any opinion to the directors as to the solvency of the bank until that afternoon. Cahill further says that he was influenced to give directions to counsel for the preparation of the proposed general assignment from the bank, not by its insolvent condition, but because he feared that the state was about to pass a law requiring banks to submit to examinations, and maintain a reserve; neither of which things his bank could do. The fact that Cahill, only two or three months before the bank's stoppage, bought its stock at \$20 per share, the par value being \$25 per share, and the further fact that he and the other directors were willing to indorse its \$5,000 note, indicate that prior to February 19, 1898, they did not properly appreciate the real condition of the bank. In view, however, of the purpose of the interview between Schott and Cahill at the bank on February 19th, the time which it consumed, and the subject-matter of discussion during that time, and the alacrity with which the directors thereafter took steps to procure the payment of the debts due to them, or for which they were liable, I am unable to give my assent to the proposition that those payments were made *bona fide* in the ordinary course of business, or that they are in equity entitled to be protected. They seem rather to have been made after the attention of the directors, or some of them, had been called to the true condition of the bank, and in contemplation and upon the threshold of a stoppage of business and commercial insolvency. What we have said does not conflict with the rulings of this court in the cases of *Brant v. Ehlen*, 59 Md. 24, 25, and *Fear v. Bartlett*, 81 Md. 443, 32 Atl. 322. In those cases the question of the fiduciary relation of the directors of a corporation to its creditors, or of their right, if they also happen to be creditors, to prefer themselves, or to secure an advantage at the expense of the other creditors, was not before the court for consideration. In the cases of *Hoffman Steam Coal Co. v. Cumberland Coal &*

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Iron Co., 16 Md. 456, and Iron Co. *v.* Parish, 42 Md. 605, although the fiduciary character of the relation of the directors of a corporation to its stockholders was the subject directly under consideration, what was there said by the court as to the design of the rule then announced being to secure a faithful discharge of their duties by the directors, and at the same time to close the door, as far as possible, against all temptations to do wrong on their part, might with propriety be applied to the situation of the directors of the South Baltimore Bank in relation to its creditors at the time the payments in question were made.

McSHERRY, C. J. (dissenting). The controlling facts of these consolidated cases are either not disputed, or, if controverted, they are free from difficulty; but there is a wide difference between the contending parties as to what are the legal principles which grow out of those facts, and which ought to govern the ultimate decision of this litigation. A brief outline of the circumstances disclosed by the record will present with sufficient clearness the pivotal points of the controversy. The South Baltimore Bank was incorporated by the general assembly of Maryland in 1868. On the 24th of February, 1898, a bill in equity was filed against it in circuit court No. 2 of Baltimore by certain creditors, and on the same day a receiver was appointed to take possession of its property and assets. In the bill of complaint it was alleged that the bank was insolvent, and this allegation was admitted by the bank in its answer. Later on, allusion will be made to this admission. The bill did not pray for a dissolution of the corporation; but on June 1st of the same year a decree was signed declaring the bank to be insolvent, and adjudging that the corporation be dissolved. The proceedings of February 24th were inaugurated at the instance of the board of directors of the bank, and this action of the board was taken late on the evening of February 23d. The cause which induced the proceeding is of vital importance in this discussion, and fortunately it is devoid of doubt or dispute. The president of the bank, Mr. Cahill, who had been holding

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that position for about 11 months, was much interested in the success of the institution. He was anxious to expand and enlarge it, believing that it was in a sound and solvent condition. So fully was he impressed with this belief that he invited Mr. Schott, the cashier of the American National Bank, to whom he had been recently introduced, to join with him in an effort to increase the capital of the South Baltimore Bank. Mr. Schott, feeling an interest in Mr. Cahill's earnestness, promised to look into the condition of the bank with a view of assisting in an extension of its business. Neither Cahill nor any of the directors had at that time the slightest idea that the bank was not absolutely solvent. Mr. Schott, pursuant to his promise, called at the bank on February 19th, and made a cursory examination of its statements, and, observing some entries which he did not think were in proper form, suggested that, if the bill were adopted which was said to be then pending before the legislature, providing for the appointment of a state bank examiner, and subjecting state banks to the same regulations and restrictions which, under the Revised Statutes of the United States, are applicable to national banks, the examiner would probably find fault with those entries. On the afternoon of February 23d, about 5 o'clock, Mr. Schott, after discovering what Cahill and the other directors did not know, —that some of the securities carried by the bank among its assets were valueless, or nearly so,—informed Mr. Cahill that "the bank was in a hopelessly insolvent condition," and said to him "that if he continued doing business after learning that his institution was insolvent * * * he not only made himself morally but criminally liable." Thereupon Cahill sent notice to the directors to convene that evening at the Carrollton Hotel. When they assembled he disclosed to them the result of Schott's investigations, and Schott, being present, confirmed Cahill's statement; and the following morning, as a result of this meeting, and pursuant to the action there had, the bill for the appointment of a receiver was filed. Mr. Schott was

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appointed at once, and later on Mr. Colton was named a co-receiver. There is no pretense that either Cahill or any other director or officer of the bank had the slightest suspicion that the bank was insolvent until Schott informed them that it was, and so informed them after the close of business on the evening of February 23d. Proceedings of some sort, but not proceedings founded on an allegation of insolvency, or even involving the question of insolvency in any form, were doubtfully contemplated by Mr. Cahill before the meeting of February 23d. Possibly on Monday, the 21st, but at all events on Tuesday, the 22d, Mr. Cahill consulted Mr. Hazell, an attorney at law with reference to a proceeding to wind up the bank if such a step should be deemed necessary by the direction in consequence of the supposed pending legislation at Annapolis. But there can be no doubt in the world that this contemplated action had relation to and was prompted solely by a consideration wholly different from a suspected insolvency. Mr. Cahill had been led to believe that a state law was pretty certain to be passed by the general assembly, under which the bank would be required to retain as a reserve fund 25 per cent. of its deposits, and would be prohibited from lending to any one person more than 10 per cent. of its capital; and he was convinced by the statements of Mr. Schott that, if the bank could not or would not comply with these provisions, its doors would be closed as soon as the law should be passed. Mr. Cahill seems to have been satisfied that it would be impossible for the bank, with its limited capital of \$28,500, and its comparatively small commercial deposits of about \$70,000, and its savings deposits of but a slightly larger amount, to continue business if this proposed law went into effect. This was explained to Mr. Hazell by Cahill, and Cahill further stated to Mr. Hazell that there would be a meeting of the directors to consider the consequences of this proposed legislation, and that he (Cahill) wanted to have such papers prepared as might be necessary in the event of the directors "deciding to do anything." But there was not the suggestion or a suspicion at

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that time of the bank being insolvent, or unable to pay its creditors in full; nor was a receivership mentioned. The whole conference with Mr. Hazell, and the papers which he was to prepare, had relation exclusively to the bank legislation which Schott had informed Cahill was then pending in the general assembly. The James Clark Company is a corporation of which Mr. Cahill is the president and treasurer, besides being the owner of all the capital stock with the exception of four shares. This company, through Cahill, had repeatedly lent to the South Baltimore Bank, without interest, considerable sums of money to meet the needs of the bank's customers. These loans are spoken of in the record as special deposits, and were purely for the accommodation of the bank. They differed from an ordinary deposit in this: that an ordinary deposit is made primarily for the convenience of the depositor, but these were taken from the James Clark Company's regular bank account with the Citizens' National Bank, and placed with the South Baltimore Bank, exclusively for the latter's benefit. On the 21st of February, 1898, the amount due by the bank to the James Clark Company on this loan or special deposit was \$10,545.77. It was subject to check whenever the James Clark Company needed the money. On the day just named the Clark Company, by Cahill, as treasurer, drew its check on the South Baltimore Bank for this sum, and deposited the check in the Citizens' National Bank, where, as stated a while ago, the Clark Company kept its regular bank account. This was done before Mr. Hazell had been conferred with, and before there was any thought of closing the bank; and it was done because Mr. Cahill needed the money to pay the bills of the Clark Company. The South Baltimore Bank was not a member of the Baltimore clearing house. It cleared through the Citizens' National Bank. To enable it to do this, it kept a deposit with the Citizens' National Bank, and against that desposit the checks cleared for it by the Citizens' Bank were charged each day. February 22d being a legal holiday, the banks were not opened; and so this particular check for \$10,545.77 appears

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in the transactions of February 23d, upon which day it was charged against the account of the South Baltimore Bank. On February 21st, the South Baltimore Bank paid the Citizens' National Bank a call-loan note of \$5,000. The money had been borrowed five days previously, as the amount of interest paid shows. This loan was evidenced by a note which Cahill, Storey, and Denny, directors, indorsed. They indorsed it, not because an indorsement was required but because by furnishing security the South Baltimore Bank procured the loan at one half of one per cent. less interest. On the same day,—February 21st—Cahill borrowed [from the Citizens' National Bank for the South Baltimore Bank the sum of \$15,000, and pledged as collateral \$18,000 of the latter's commercial paper. This is not an unusual occurrence in the banking business. On the 4th of June, 1898, two bills in equity were filed by the receivers,—one against the James Clark Company and Cahill; the other against Cahill, Story and Denny. Under the first the payment of the \$10,545.77 made by the South Baltimore Bank to the James Clark Company on the check drawn February 21st, is assailed; and under the second the payment of the \$5,000 call-loan note on the same day is attacked. Under the first the receivers seek to recover back from the Clark Company and from Cahill the money paid by the South Baltimore Bank on the check. Under the second they seek to recover from the indorsers of the call-loan note, but not from the Citizens' National Bank, the payee, the money paid by the South Baltimore Bank to the Citizens' National Bank. The two cases have been consolidated. The ground upon which recovery is sought in each case is the same, and that ground is that the payment of the check and of the note was a preference given to two creditors of the insolvent bank to the prejudice of all its other creditors, for whom and for whose benefit Cahill and the other directors were, in virtue of their office as directors, trustees; and as trustees they were prohibited from preferring themselves at the expense of their *cestuis que trustent*. Did these transactions, under the conditions and circumstances

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stated, constitute prohibited preferences? A preference is an advantage, and to be a prohibited preference it must either be one which contravenes some equitable principle, or violates some positive statutory provision. In neither instance can it exist if there is no insolvency, because, if there is no insolvency, there can be no inequality in the payment of creditors, and without inequality there is no advantage. At the foundation of the investigation, therefore, lies the inquiry whether, on February 21st, when these payments were made, the South Baltimore Bank was insolvent. But before this inquiry can be answered accurately or intelligently, it is necessary that there should be a clear understanding of what is meant by the term "insolvency." If insolvency means a condition where liabilities are greater than the value of assets, then the bank was, as subsequent events showed, not only insolvent on February 21, 1898, but it had been equally and continuously so for four years antecedently thereto. Such a test of insolvency, however, would wreck a large proportion of flourishing enterprises. What railroad or city passenger railway company, for instance, could possibly exhibit available assets equal in actual cash value to its bonded and other indebtedness? But, if insolvency means merely an inability to pay debts when and as they mature in the ordinary course of business, then the bank was not insolvent, and its doors should not have been closed. There is a difference between a bank which has something less of assets than of liabilities and a bank which has assets equivalent to or greater than its liabilities, if those assets are unavailable, or cannot be converted into money. But the advantage is on the side of the former. The one, having less assets than liabilities, may be able to continue its business, while the other, having more assets than liabilities, might be forced to suspend because of its inability to meet the demands made on it in the usual and ordinary course. The first, though having a deficiency of assets, would be commercially solvent; the second, though having an excess of assets, would be commercially insolvent. The relation of

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the assets to the liabilities cannot, therefore, be the ultimate test of solvency.

The meaning of insolvency in its legal sense is not now open to debate in Maryland. Following the definition laid down by the supreme court in *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, this court distinctly and categorically adjudged that insolvency must be taken to mean "an inability of the debtor to pay his debts as they become due in the ordinary course of business." *Castleberg v. Wheeler*, 68 Md. 277, 12 Atl. 3. Now, it is clear from the evidence that the bank was in better condition when it suspended business than it had been in for four years previously. There is nothing in the record to show that it was unable to pay its debts as they became due in the ordinary course of business. On the contrary, it had paid them as they matured in the past. It was not without ample funds, and it had facilities for procuring ready money if emergencies required that it should have more than its vaults contained. No bank that is not utterly stagnant and lifeless ever carries as much cash as it owes its depositors. Its ability to meet the demands made upon it as they mature in the due and ordinary course of business, and not the amount of cash on hand, or the isolated fact that its assets are equal to its liabilities, is the test of its solvency and the measure of its duty to its creditors. The South Baltimore Bank had the confidence of the people of South Baltimore; and Mr. O'Connell, cashier of the Citizens' National Bank, and a totally disinterested witness, testified: "I believed it to be solvent then, and do yet, and I think it was in a great deal better financial condition than thousands of people who make fortunes and die rich. They had credit, character, standing, confidence, and some money." "They never ought to have made an assignment." At the close of business on February 21st, after the payment of the \$5,000 call-loan note, and after crediting the \$15,000 borrowed on collateral, the bank had in its vaults and on deposit with the Citizens' National Bank, a balance of \$31,409.50; and on the 23d, at the close of business, after

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paying the \$10,545.77 check, it had a balance of \$23,295.13, while its liabilities to depositors aggregated about \$140,000. It thus had quite as large a reserve as is required to be held by national banks outside of New York, Baltimore, and a few other cities. Section 5191, Rev. St. U. S. Even if the \$15,000 had not been borrowed, both the note and the check could have been paid, and there would have been a balance of \$8,295.13 still left in cash. But the \$15,000 was procured, so Cahill says, to have a fund for customers who might wish to borrow; and this is not disputed or denied. During these same two days the deposits received—both commercial and savings—aggregated \$24,608.50. If we turn to the statements, and compare that of January 30, 1897, with that of January 31, 1898, it will be found that the commercial deposits rose from \$45,380.39 to \$71,610.91, and the savings deposits rose from \$65,152.02 to \$72,671.51. The loans and discounts swelled from \$71,924.74 to \$94,865.75. These figures indicate a growth, a development, and an activity, rather than degeneracy or decline; and, as there is nothing in the record to show that the bank could not have continued in the usual, ordinary course other than the single fact that it did not continue because of being misled, there is no evidence of an insolvency in the legal sense of the term. Now, if there is any credence to be placed in human testimony, not an officer or a director of the bank had any knowledge that the bank was insolvent in either sense of the term. Their acts are more emphatic and more significant than their words. Though the capital stock was carried on the statements at less than 50 per cent. of its par value of \$25 per share, both Cahill and Storey bought shares at \$20, or 80 per cent. of par, shortly before the collapse, and that, too, though the stock thus bought, as well as that which they previously held, was subject to the double liability clause prescribed by section 39, art. 3, of the state constitution and by section 18 of the bank's charter. On February 17th, Cahill, Storey, and Denny indorsed the call-loan note for \$5,000, and Storey made deposits as late as February 23d. It is simply incredible

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that these men would have purchased stock at nearly twice the value estimated in the statements, would have exposed themselves to this double-liability burden, would have assumed responsibility as indorsers, and deliberately deposited their money up to the last moment the bank's doors were open, if they had not honestly believed the bank to be solvent. If they are to be charged with knowing what they ought to have known, but did not know, then they could be charged with knowledge that the assets were less than the liabilities; but that would not be knowledge that the bank was insolvent.

While there can be no prohibited preference where there is no insolvency, there may be insolvency, in the popular sense, and still be no preference which contravenes any equitable principle, though a payment has been made to one creditor, who is also a director, to the exclusion of other creditors. The trust-fund doctrine, which is the equitable principle relied on to invalidate these payments, is said to have had its origin in *Wood's Case*, 3 Mason 308, Fed. Cas. No. 17,944. But that was a contest between stockholders and creditors of a bank, where the stockholders appropriated the assets to the exclusion of the creditors. "But, whatever may have been the origin of this doctrine," said this court in *Fear v. Bartlett*, 81 Md. 443, 32 Atl. 323, "it means, and can only mean, that when a corporation has been lawfully dissolved, or has become insolvent, its entire property, including unpaid subscriptions to its capital stock, becomes a trust fund for the payment of its debts, and that creditors are entitled in equity to have their debts paid out of the assets of the company before there can be any distribution among the stockholders. * * * But it is only when the company has been dissolved or has become insolvent that this equitable doctrine arises. So long as the company is a going concern, having the possession and management of its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals." Other cases might be cited to the same effect, but they would

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make the principle no more apparent, though I may refer to *Comfort v. McTeer*, 7 Lea 652. This trust-fund doctrine has never been pushed as far in this state, as it is now attempted to carry it. When a corporation has ceased to be a going concern, when it has been dissolved, when it has no longer the possession and management of its property, or when it has become insolvent in the sense that it is unable to pay its debts as they mature in the usual and ordinary course of business, it may well be that all its assets and property become a trust fund, and that its officers and directors become trustees for the benefit of its creditors. But this doctrine has no existence during the time the corporation is a going concern, or while it has not been dissolved, or when it is not insolvent in the legal sense. Notwithstanding this, the specific contention with respect to the check is that, if the depositor in a bank draws his check upon that bank, and the check is paid in the usual and ordinary course while the bank is a going concern, the payment of that check is a prohibited preference if two days afterwards the bank closes its doors, and goes into liquidation, and if the drawer of the check was a director or an officer of the bank. And the specific contention with respect to the call-loan note is that if such a note is paid in the usual course of business, and the debtor bank suspends operations a few days afterwards, the indorsers of that note, if they happen to be directors, must pay to the receivers of the debtor bank the money paid out of the funds of the debtor to the creditor bank in settlement of the call-loan note. These contentions, if sustained, make the directors trustees for the creditors while the bank is a going concern, and while it is still solvent; and, besides that, they stand directly in antagonism to the principle which the supreme court applied in *McDonald v. Bank*, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106. The Capital National Bank of Nebraska for some years carried on a large business intercourse with the Chemical National Bank of New York. The Capital Bank transacted the usual and

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ordinary business of a national bank up to the close of banking hours on January 21, 1893. On the next day a bank examiner took possession of it, and on February 6th a receiver was appointed. It appeared in evidence that on January 18, 1893, the account of the Capital Bank with the Chemical Bank was overdrawn to the amount of \$84,486.19, and that by sundry remittances made the overdraft was cut down to \$25,515.32 on January 21st. It also appeared that on January 18th the Schuster-Hax National Bank of St. Joseph, Mo., remitted by mail \$2,000 to the Chemical Bank for the credit of the Capital Bank; that on January 19th the Packers' National Bank of South Omaha remitted to the Chemical Bank \$5,000 for the credit and advice of the Capital Bank; that on January 20th, two days before it was closed, the Capital Bank remitted by mail to the Chemical Bank \$735, in small items, and a package amounting to \$2,935.60, and on the 21st (the last day the bank was open) another package, amounting to \$833.64. On January 23d—after the Capital Bank's doors had been closed by the examiner—the Chemical Bank received the remittance of \$2,000 of the 18th, and those of \$5,000 of the 19th, and of \$2,935.60 and of \$735 of the 20th; and on the 24th it received the remittance of \$833.64 of the 21st. The receiver of the Capital Bank filed a bill against the Chemical Bank to recover from it the moneys received by it after the suspension of the Capital Bank. The relief sought was denied. In the course of its judgment the supreme court said: "Nor can a finding that the payments and remittances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency, and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent

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events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided. In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that up to the last the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed." The trust-fund doctrine does not apply because the point of time at which, as respects creditors, it arises, if it arises at all, had not come to pass when the payments were made. There was no legal insolvency, and the bank was a going concern, and had not suspended when the check was drawn and paid, and when the call-loan note was settled. Both were paid in the usual and ordinary and accustomed course of business, and at a time when there was no doubt in the minds of the directors and officers that the bank was solvent, and when there was no thought of discontinuing its business. Under the most rigid and extreme application

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of the trust-fund doctrine the directors do not become trustees for the creditors, however they may stand towards the stockholders, until the corporation ceases to be a going concern, or is insolvent in the sense of being unable to meet its obligations as they mature in the ordinary course of business. If this were otherwise, then no one could venture to be a depositor in a bank of which he was a director; and then, too, the very depositors for whose benefit the receivers are prosecuting these suits would be bound to pay back some \$96,000 of funds drawn out by them within the four months prior to the suspension of the bank, if they happened to be directors or officers of the bank. For if it be a preference to pay two days before suspension, it is equally a preference to pay four months anterior thereto. The mere proximity of the time of payment to the actual suspension can make no difference in the legal principle, if it be a legal principle, that such payments as these are preferences. The trust-fund doctrine, as heretofore applied in Maryland, has never been stretched to the length of declaring that the payment by a bank of the check of a depositor drawn by him in good faith, and in the usual course, was a preference if the depositor happened to be a director and the bank was a going concern and was believed to be perfectly solvent, though it closed its doors a few days afterwards, not because it was unable to continue business, but because its officers were misled in supposing that it was insolvent when in fact it was commercially solvent. Nor has it ever yet been held in this state that the payment by a going bank of a call-loan note to another bank in the usual and ordinary course of business was such a preference as would hold the indorsers of that note liable to the receivers of the bank which made the note, merely because, after the payment of the note, the debtor bank closed its doors, and turned out to be insolvent in the sense that the actual, but not the nominal, value of its assets was less than the aggregate of its liabilities.

But there is another view of this question, which ought not to be overlooked. In the discussion thus far the situa-

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tion has been treated from the standpoint that the check for \$10,545.77 was drawn by a depositor who was also a director, but the fact is that the depositor and the director were not one and the same. The depositor was a corporation, and the person who was the president of that corporation was the director. It was the check of the corporation which was drawn and paid, and the precise question is this: Does the circumstance that the president of the depositing corporation was a director of the bank prohibit that corporation from withdrawing the money it had on deposit if the bank's assets were less than its liabilities? That question, presented under circumstances of conceded and known insolvency, arose in the very recent case of *O'Brien v. Bridge Co.* (N. Y. App.), 56 N. E. 74. In that case a director of a bank, being also the president of the bridge company, became aware of the impending insolvency of the bank, whereupon the check of the bridge company for the sum of \$50,000, being the balance to its credit in the bank, was drawn and was signed by the president of the bridge company' who was also a director in the bank. The full amount was secured in payment of the check on the same day that the bank was closed. It was held, in a suit by the receivers of the bank against the bridge company, that the transaction was not void under the stock corporation law (section 48), which prohibited an insolvent corporation, its officers and directors, from making any assignment or payment with intent to give a preference to a particular creditor, since there was nothing in that provision to prevent a depositing corporation from withdrawing its money on information of the bank's insolvency received by its president in his capacity as director in the bank. It is not necessary for the decision of the case at bar to go that length. If the receivers had sued the Citizens' National Bank to recover from it the \$5,000 paid to it in settlement of the call-loan note, would they not have been confronted with and defeated by the case of *McDonald v. Bank*, *supra*? If the payment was made in the ordinary course of business, it was not a preference, and

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the money could not have been recovered from the Citizens' Bank. Upon what principle, then, can the indorsers be made to pay to the receivers the money which was lawfully paid to the Citizens' Bank, and which the latter, if sued by the receivers, could retain as against them? If the Citizens' Bank could retain the money, it is because the payment to it was lawful; and, if the payment to it was lawful, how can the indorsers of the note, who were only responsible at all, in the event that the note was not paid by the South Baltimore Bank, be made liable to the receivers because the note was paid, and lawfully paid, by the South Baltimore Bank? If the payment was lawful, the indorsers cannot be held liable upon the theory that it was unlawful. *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. Undoubtedly there are cases to be found in the books where directors of an insolvent corporation, who are also indorsers of its paper, have been denied preferences secured by themselves at the expense of other creditors; and in many of the opinions delivered in those cases very broad language has been used. But those cases could not be applied in this state without departing from or greatly extending the trust-fund doctrine as understood in Maryland. It must be borne in mind that, while there are vague allegations of fraud, there is not the slightest evidence to support them; and the proof is clear and conclusive that not a person connected with the South Baltimore Bank had a suspicion that it was insolvent until Schott so informed Cahill at 5 o'clock on the evening of February 23d, long after these impeached transactions had occurred, and had been closed. Not even Schott pretends that the bank was insolvent in the commercial sense of the term. The answer of the bank to the bill for a receiver admits insolvency, but obviously in the same sense that Schott understood it; because that is the kind of insolvency charged in the bill,—a deficit in the assets, but not an inability to pay demands in the ordinary course of business as they fell due. It would be impossible, in the limits of an opinion, to review all the cases cited in the brief of the learned coun-

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sel for the appellees. To a great extent they involve different principles from the one now under discussion. For example, *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, did not present a question of preference, but a question of fraud. It did not involve the relation of a director towards a creditor, but the relation of a director towards the company. It concerned not the payment by the company to a director of a *bona fide* debt, but the fraudulent acquisition of the company's property by the director. The question there and the question here are not analogous, but depend on entirely different principles. In *Swentzell v. Bank* (Pa. Sup.), 23 Atl. 415, the money was drawn after the bank had suspended payment. In *Brown v. Stove Co.* (Tenn. Ch.), 42 S. W. 161, the corporation was insolvent when it sold all of its assets to its secretary in payment of a debt. Before the sale the directors had determined to quit business because of insolvency, and the secretary knew this. Of course, the sale, in such circumstances, was invalid. Cases not in line with the doctrine laid down in *Fear v. Bartlett*, *supra*, would not be followed in Maryland, and need not be discussed.

If the two transactions assailed in these proceedings are not invalid because not in conflict with the trust-fund doctrine, are they void because contravening some positive statute? Section 14, art. 47, of the Code, as amended by Act 1896, c. 446, declares that "no deed, or conveyance executed, or lien created by any person being insolvent or in contemplation of insolvency * * * shall be lawful or valid if the same shall contain any preferences, * * * and all preferences * * * shall be void, howsoever the same be made; provided" the party creating them be proceeded against in a certain way, and within a certain time, and be declared, or becomes "under the provisions of this article, an insolvent." This provision of the insolvent law would have had no application to a corporation (*Ellicott v. Search*, 72 Md. 25, 18 Atl. 863) had it not been for Act 1896, c. 349. By that act a new section, known as "section 264a," was added to article 23 of the Code, relating to cor-

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porations. It provides that: "Whenever any corporation mentioned in section 264 of this article * * * shall have been determined or proven to be insolvent as in said section 264 stated, all payments, conveyances and assignments of money, property, debts or claims of said corporation and all preferences howsoever made by it, or by any of its officers on its behalf, which would be void or fraudulent if the same had been made by a natural person who had become an insolvent under article 47 of the Code, * * * shall to the like extent and with like remedies, be fraudulent and void when made by such corporation or by any of its officers on its behalf, and whenever any such corporation shall have been adjudged to be dissolved as provided in the next preceding section, * * * all of its property and assets of every description shall be distributed to the creditors of said corporation; * * * and the receiver of such corporation shall have the same power and authority to maintain suits and proceedings to set aside preferences * * * as the permanent trustee of an insolvent debtor has under article 47 of the Code, * * * and the date of the filing of the bill against such corporation, upon which it may be dissolved, shall be taken and treated for the purpose of determining the validity of preferences * * * as the date of the filing of the petition in insolvency by or against a natural person." Section 264 of article 23, referred to in the above provision, declares, as amended by Act 1894, c. 263, that "whenever any corporation in this state shall have been determined by legal proceedings to be insolvent, or shall be proved to be insolvent by proof offered under any bill filed under the provisions of this section, it shall be deemed to have surrendered its corporate rights, privileges and franchises, and may be adjudged to be dissolved after the hearing, according to the practice of the courts of equity in this state, upon a bill filed for that purpose" in the proper tribunal. This collocation of the statutes discloses two things: First. That while a corporation cannot be proceeded against under the insolvent laws,

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its transactions may be dealt with when it is proceeded against according to the terms of the act of 1896,—that is, section 264a,—precisely as the same transactions of an individual may be treated if he were proceeded against under the insolvent laws. Secondly. That the provisions of the act of 1896 or section 264a can only be availed of when the proceedings against the corporation have been taken under section 264 of article 23 of the Code as amended by the act of 1894. Now, as to the application of these two propositions, in their inverse order, to the pending cases. What is the proceeding for which section 264 makes provision? Its terms furnish the most satisfactory answer: “Whenever any corporation shall have been determined by legal proceedings to be insolvent, or shall be proved to be insolvent by proof offered under any bill filed under the provisions of this section, it * * * may be adjudged to be dissolved * * * upon a bill filed for that purpose.” When either of these two things occurs,—that is, when a corporation has been determined by legal proceedings to be insolvent, or when it has been proved to be insolvent under a bill filed under this section,—then it may be adjudged to be dissolved upon a bill filed for that purpose. Obviously, then, there must be a bill filed for the purpose of having it dissolved, and that relief can only be granted when insolvency has been established in one or the other of the two modes indicated. When the dissolution prayed for—when the dissolution which is the purpose for which the bill has been filed—has been decreed, then, by the express terms of the act of 1896 or section 264a, the assets shall be distributed “and the receiver * * * shall have the same power * * * to maintain suits * * * to set aside preferences * * * as the permanent trustee of an insolvent debtor has under article 47 of the Code,” but not until such a decree has been passed. Now, the bill which was filed against the South Baltimore Bank, and under which the receivers were appointed, nowhere prays for a dissolution of the corporation. It was not “a bill filed for that purpose”;

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and, as it was not a bill filed for that purpose, the subsequent decree dissolving the corporation under a bill which did not pray for that relief at all does not bring the assailed preferences within the terms of the act of 1896, and they are not, therefore, such preferences as that act denounces, or such as the receivers may assail. The jurisdiction conferred by the act of 1896 is special, and must be strictly pursued. 12 Am. & Eng. Enc. Law, 277, note 1. But, even if the statute of 1896 (section 264a) were applicable, are these payments preferences within the meaning of section 14 of article 47 of the Code,—the article relating to insolvency? Any transfer made by a debtor, and, of course, any payment made by him, he “being then actually insolvent, or contemplating such state of insolvency, with a view to secure his property, or any part of it, to one or more creditors, and thus prevent an equal distribution among all his creditors, is a transfer [or a payment] in fraud of the insolvent law.” *Castleberg v. Wheeler*, 68 Md. 277, 12 Atl. 3. There must be insolvency, or a contemplation of insolvency, and there must be a transfer or payment with a view—that is, with an intent—to secure a particular creditor to the detriment of other creditors. When a debtor who knows that he is insolvent makes a payment or a transfer which operates to prevent an equal distribution of his assets among all his creditors, he is, in law, presumed to have intended to create a preference, because a preference is the natural and necessary result of such an act; and he is held to have intended to bring about the natural and the necessary consequence of the act which he deliberately did. But, if a debtor honestly believes himself to be solvent, he rebuts the presumption of intent to prefer which arises from the fact of actual insolvency. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481. An intent to prefer cannot be predicated of a payment made in total ignorance of insolvency. So it comes to the question: Was the bank insolvent within the meaning of Act 1896, c. 349, and of section 264, art. 23, of the Code, when the payments were made? The decree of June 1st does not answer that inquiry. The question is not

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whether Cahill and the directors had actual knowledge, or were bound to know, and therefore were chargeable with constructive knowledge, that the value of the assets was less than the sum of the liabilities; for, as already pointed out, that is not the test of insolvency under the insolvent law, and it ought not to be the test under the act of 1896 and section 264 of article 23 of the Code. By the national banking act of 1864 it was provided that all payments of money made by a national banking association to its shareholders or creditors after the commission of an act of insolvency, or when in contemplation of insolvency, with a view to the preference of one creditor to another, "shall be utterly null and void." It was held in *Case v. Bank*, 2 Woods, 23, Fed. Cas. No. 2, -489; *Morse, Banks*, 576,—that the word "insolvency" in this statute had the same meaning as in the national bankrupt act, and that it meant a present inability to pay in the ordinary course of business. Obviously, by analogy the same meaning should be given to the word "insolvency" in the act of 1896 and in section 264 of article 23 as this court ascribed to it in the insolvent law, for the act of 1896, though amendatory of the general corporation law, is in fact supplementary to the insolvent system. Was the bank, then, unable to pay its debts when due, in the ordinary course of business? This question has been already answered in the negative in defining what was meant by insolvency, and it need not be repeated here. It is sufficient to say that there is not a particle of evidence in the record to show that it was unable to continue in business, or to meet every demand made on it in the usual course; and there is absolutely nothing from which it could be inferred that these payments were made in contemplation of insolvency, for they were not made in contemplation of stopping business because of insolvency. 3 Am. & Eng. Enc. Law (2d Ed.) 785. There is, however, most abundant evidence to prove that its officers honestly believed it to be perfectly solvent until misled by Schott late on the afternoon of February 23d. It would be an exceedingly harsh and a hitherto untried construction of the insol-

Note

vent law and of the act of 1896 to hold, because subsequent efforts to realize the cash from some of the investments showed a shrinkage in the value of the assets below the aggregate of the indebtedness, that, therefore, though the same condition had existed for four years previously, the bank, notwithstanding it was a going and apparently a prospering concern, was insolvent when these payments were made, and that the directors ought to have known that it was. As there was no such insolvency when the receiver was appointed as the statute takes cognizance of, the payments made were not preferences which the insolvent law denounces; and, as there is no other statute prohibiting them, it follows that they were not made in contravention of any legislative enactment. These payments, then, not having been made in breach of any settled equitable principle, and not having been made in violation of any statute, were not prohibited preferences, and the receivers ought not to be allowed to recover them. It results, therefore, that the decree below which directed the James Clark Company and Cahill in the one case, and Cahill and Denny (Storey being dead) in the other case, to pay over to the receivers the money claimed under the bills filed against them respectively is wrong, and ought to be reversed, and that the bills ought both to be dismissed. This is the conclusion which a careful examination of the case has forced upon me, and I do not see how, entertaining the views I have expressed, I can escape dissenting from the judgment of the majority of my Brothers. There are many other cases I might cite, but it is not necessary.

NOTE.

Preference of Directors. — See *notes*, 1 Banking Cases 631 *et seq.* See also for an able discussion of this question the article by Mr. Chas. A. Collin in 1 American & English Corporation Cases, N. S., entitled "The Right of Insolvent Corporations to Prefer Creditors in The Absence of Statutory Restriction."

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J. M. JAMES CO.

v.

CONTINENTAL NAT. BANK.

(*Supreme Court of Tennessee, June 6, 1900.*)

Checks—Dishonor—Action for Damages—Limitations—Statute.—A statute of limitations only applicable to actions “for slanderous words spoken,” is not applicable to an action against a bank for damages for breach of contract in refusing to honor a depositor’s check.

Same—Same—Damages—Pleading.*—Substantial damages may be recovered against a bank for wrongfully, willfully, and maliciously refusing to honor a depositor’s check, if he is a “trader,” without alleging special damages.

Same—Same—Bank’s Lien—Pleading.—In such an action, plaintiff is not required to allege that the bank had no lien on the money deposited by him.

Same—Same—Damages—Pleading—Evidence.—In such an action, plaintiff cannot show that certain persons have ceased to deal with him because of the dishonor of his checks by defendant, unless the loss of their custom is set out in the pleadings as special damages.

Same—Same—Same—Evidence.—In such an action, evidence is admissible to show the general impairment of plaintiff’s credit by the dishonor of the checks in question.

Same—Same—Same—Same.—In such an action, it was error to instruct that plaintiff was bound to show that he was damaged by the refusal to honor the checks, and how he was damaged, and the amount of the same, it having been alleged and proved that he was a “trader.”

Same—Same—Injury to Credit.—In such an action, it is error to instruct that the only damage that can be considered by the jury is the damage to the credit of the plaintiff with the persons to whom he gave the checks which were wrongfully dishonored.

Instructions.—It is error to give an instruction not warranted by the evidence.

ERROR by both parties to Shelby county circuit court.
Reversed.

*See notes at end of case.

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Thos. H. Jackson and H. C. Warriner, for plaintiff in error.

Metcalf & Metcalf, for defendant in error.

BEARD, J. The J. M. James Company, a mercantile firm in Memphis, was on the 19th day of March, 1897, a customer and depositor with the defendant bank. On that day it drew

several checks in favor of different payees on this bank, which were presented the following day for payment. When so presented, payment was refused, and their respective holders were notified of the fact. Subsequently this action of the bank was reconsidered, and the checks were recalled and paid. On the 12th of April, 1898, the present suit was instituted. The declaration of the plaintiff contained five counts, substantially as follows: " (1) That the plaintiff was and had been engaged as a trader, in the mercantile and commission business, in Memphis, for several years prior to March 19, 1897, and a customer of and depositor with the defendant bank, and that on that day, and for several days prior and subsequent thereto, it had on deposit with the defendant \$3,212.46, subject to plaintiff's checks; that on said day it drew several checks on defendant bank, as follows: One in favor of W. W. James for \$500, one in favor of W. H. Cousins for \$54.51, one in favor of W. H. Cousins for \$2,251 76, and one in favor of the Memphis National Bank for \$250; that said checks were presented on the following day, March 20, 1897, to the defendant bank for payment, whereupon defendant refused to pay said checks, and they were thereby dishonored, and that such refusal was wrongful on defendant's part, and a breach of its contract with plaintiff, and plaintiff has suffered great injury therefrom. Wherefore plaintiff has been damaged in the sum of \$75,000, and sues." (2) After repeating in the language of the first count, the second count alleged: "The refusal and failure of defendant to pay said checks, when it had on deposit more than a sufficiency of money to pay them, deposited with it by plaintiff, was wrongful, willful, and malicious, and plaintiff has suffered great injury

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therefrom. Wherefore the plaintiff has been damaged in the sum of \$75,000, and sues." (3) After repeating as in the last count, the third count alleged: "The refusal and failure to pay said checks, when it had on deposit more than a sufficiency of money to pay them, deposited by plaintiff with defendant, as aforesaid, was wrongful, willful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation; and plaintiff avers that it has been injured in its credit, business, and reputation by the damage thereof, and has suffered to the extent of \$75,000. Wherefore plaintiff sues." (4) After averring as in the former counts, the fourth count alleged: "This failure and refusal on the part of defendant to pay said checks was wrongful, and a breach of its contract with plaintiff; and plaintiff avers that it has been injured greatly thereby, its credit has been injured, its reputation hurt, and plaintiff has in consequence of defendant's said breach of contract lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has suffered damages to the extent of \$75,000, for which it sues defendant." (5) After averring as in the former counts, and that plaintiff was doing business in the state of Arkansas, Mississippi, and Tennessee, and that it possessed the confidence of the business public in its integrity and fair dealing, said fifth count alleged: "This failure and refusal on the part of the defendant to pay said checks was wrongful, willful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation. The plaintiff further avers that it has been greatly injured and wronged in its credit, business, and reputation; that, by said wrong inflicted on it by defendant, plaintiff's credit has been impaired, its business reputation hurt, and as a consequence thereof it has lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has been damaged to the extent of

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\$75,000, for which it brings this suit." The defendant demurred to all five of the counts. The court below sustained the demurrer to the last four of the counts, and overruled it as to the first, upon which, and a plea to it, the case was tried, resulting in a verdict of one dollar for the plaintiff. A new trial having been refused, an appeal in the nature of a writ of error has been prosecuted to this court by the plaintiff below. Many errors are assigned for reversal of the cause.

The record is also before us upon a writ of error sued out by the defendant bank, which assigns error to the action of the trial judge in overruling its demurrer to the first count.

One of the contentions presented by the demurrer was that all the counts of plaintiff's declaration were laid in tort, to recover damages for slander to the reputation and credit of the plaintiff, and that the suit was barred by the statute of limitations of six months. This somewhat novel view was adopted by the trial judge, as to the last four counts, and as to them this ground of demurrer was sustained, but overruled as to the first; the court holding, as we assume, that this count was one *ex contractu*. It is with great earnestness argued by the defendant bank that, as to these four counts, this is a sound view, and that the judgment of the lower court in this regard should be maintained. The statute of limitation relied on by the demurrant, and applied by the trial court to the counts in question, is in these words: "Actions for slanderous words spoken shall be commenced within six months after the words spoken." Shannon's Code, § 4468. It would seem as if it would have been difficult for the legislature to choose words which would more clearly exclude such an action as the present one from the operation of this section, or more apt to embrace alone an action for slander, as this offence is defined by the text-books, the reported cases, and by standard lexicographers, both law and literary. All these substantially agree in defining slander as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means

Checks—Dis-
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tations—Statute.

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of getting a living of another. Cooley, Torts, pp. 229, 235; Newell, Defam. 40; Townsh. Sland. & Lib. § 3; Rap. & L. Law Dict. 1198; 3 Bl. Comm. 183; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; Harrison v. Burem, 1 Tenn. Cas. 94; Webst. Dict. But it is urged that slander may be perpetrated by an act or deed, and that when a banker wrongfully rejects his depositor's check, as is charged in these counts, he slanders his business reputation and credit,—as much so as if he had defamed him in uttered words; that in such case it is the “act speaking,” thus bringing the case within the terms of the statute. It is true, we often say that actions speak, as in the homely adage, “Actions speak louder than words;” but this is a mere figure of speech, and by it is meant that the acts or deeds of one convey to others more distinct impressions than mere words, and frequently contradict the latter. But the legislature was not, in passing this statute, refining upon the term “slander.” An act may, in the sense indicated, speak, but it has no articulate voice; and it is the slander so uttered (that is, by spoken words) which is in the spirit and letter of this section. We have examined the authorities relied on by demurrant to sustain the trial judge in the conclusion reached by him that these were counts in slander, within the terms of this section, and by it barred, because the suit was brought more than six months after the utterance of the slander, and we can discover in them no support for the contention of demurrant. Before referring to them it is well to say that in none of the works on Libel and Slander, accessible to us, have their authors included what is called by the counsel for demurrant “slander by deed or act.” Slander by spoken words is uniformly the subject of their text. In fact, Mr. Odgers, in the introduction to his work on Libel and Slander (page 7), says: “A man's reputation, also, may be injured by the deed or action of another, without his using any words, and for which injury he has an action on the case, but such cases are not within the scope of the present treatise.” Among

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the illustrations of such an actionable injury, but yet outside the limits of a work on slander, the author gives that of "a banker having in his hands sufficient funds belonging to his customer, and dishonoring his check." Cited to this text are the cases of *Marzetti v. Williams*, 1 Barn. & Adol. 415, and *Rolin v. Steward*, 14 C. B. 595; and, while they support it, they give no color to the present insistence that this act of the banker is slander, either in its technical or common acceptation. On the contrary, WILLIAMS, J., in the last-mentioned case, says that such an action is like an action of slander brought by a trader, as such, for an imputation of insolvency, so far as the right to recover in damages is concerned; thus, by implication, negating the idea that it was an action of slander. Upon the basis of the analogy thus suggested between the two actions, as to the right and measure of recovery of damages, rests whatever there may be misleading in the later authorities. Mr. Cooley, in his work on Torts, in note to the text on page 203, says, "It is a species of slander of credit for a bank to refuse to honor the check of his customer who has money on deposit subject to call," citing to his note these two English cases. This is also true as to a footnote found on page 58, Townsh. Sland. & Lib. The only case, which the industry of counsel for the demurrant has been able to bring to our attention, which gives any support to his contention, is that of *Svensden v. Bank*, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. Rep. 523. This, like the two cases already referred to, was an action by a trader against a bank to recover damages for dishonoring his check when it had ample funds of the depositor to meet it. In dealing with the question of the right to substantial damages, the court said: "The case of *Patterson v. Bank*, 130 Pa. St. 419, 18 Atl. 632, seems to place the right to recover more than nominal damages in such a case on the ground of public policy; but the other cases place it, rather, on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slan-

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dering the trader in his business. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such slander." It is apparent, however, that the court was not treating the case in hand as an action for slander, but was dealing with the act of the bank, that was just as effectual in imputing dishonesty or insolvency to its customer as if either had been charged against him by word of mouth, and in the analogy between the cases found a ground common to both for substantial damages. This same analogy is pointed out in *Shaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; *Bank v. Goos*, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190; and *Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139. These cases, like the others, are dealing with the question of damages properly recoverable upon the mere averment of the plaintiff, without more, that the plaintiff was a trader; and all agree that in such a case he should be awarded temperate but substantial damages, for in such a case "it is as in cases of libel and slander, which description of suit it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world." *Bank v. Davis, supra*. We think there can be no doubt that the trial judge fell into serious error in treating these counts as counts in slander, and holding them barred by the statute of limitation of six months. He was equally guilty of error in sustaining the defendant's first ground of demurrer to the second count of the declaration. This count has already been set out. It is in tort. It was a count for a breach of duty growing out of the implied contract of the bank to honor plaintiff's checks as long as he had money to his credit. It was a count *ex delicto*. *Junker v. Fobes* (C. C.), 45 Fed. 840. It alleged that plaintiff was a trader, and as such engaged "in the mercantile or commission business in the city of Memphis," but, as may be seen, averred no special damage as the result

Same-Same-Damages-Pleading.

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of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal. The authorities are uniform that the averment that plaintiff is a trader is sufficient, and he is entitled in such a case to recover substantial damages, though special damage is not alleged. *Rolin v. Steward*, *supra*; *Patterson v. Bank*, *supra*; *Bank v. Davis*, *supra*. And in *Shaffner v. Ehrman*, *supra*, it is held that the averment that plaintiff is a trader supplies the lack of allegations that he suffered special damage, or that the defendant acted out of malice in dishonoring his check. The assignments of error taken by plaintiff below to the action of the court in the two particulars just mentioned are therefore well taken.

Again, the trial judge was in error in sustaining the following ground of demurrer, to wit: "The defendant demurs for this: The plaintiff fails to aver that the bank did not have a lien on said moneys which were on deposit as alleged, for an indebtedness due by plaintiff to defendant." It is clear that, if such lien existed, it was a matter of defense, to be brought forward by plea. There is no rule of correct pleading which required the plaintiff to negative it in its declaration.

Error is assigned upon the action of the trial court in rejecting the testimony of one John C—— that prior to the dishonor of the checks in question he frequently induced his patrons to send their cotton to the house of plaintiff in error, but that after this time he ceased to do so, and also that, having lost confidence in plaintiff in error by reason of this dishonor, he did not send his own cotton. This testimony was properly rejected. In an action of slander by a trader for defamatory words spoken of him in the way of his trade, no averment of special damage is necessary, because the words are actionable *per se*. *Bank v. Bowdre*, 92 Tenn. 724, 23 S. W. 131. And, in the absence of such averment, evidence of general loss of business is always admissible, for this is not special damage. But the plaintiff cannot show that partic-

Same—Same—
Bank's Lien
—Pleading.

Same—Same—
Damages—
Pleading—
Evidence.

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ular persons have ceased to deal with him, unless the loss of their custom is set out in the pleadings as special damage; for it is right that the defendant should be furnished with their names before trial. Odgers, Lib. & Sland. p. 318; Townsh. Sland. & Lib. § 345. There is such analogy between the present action and one for slander of a trader, it is evident the same rule is applicable. On the other hand, the testimony of Stratton, the secretary of the plaintiff company, showing the general impairment of the credit by the dishonor, of these checks, was within the rule of competency, and was improperly excluded from the jury.

Same—Same—
Same—Evidence.

In his summary of the material points which the plaintiff must establish in order to recover, the court said to the jury: "It [the company] must satisfy you that it was damaged by the refusal of the bank to pay its checks, and how it was damaged, and the amount of the same, where it was subject to definite proof." This was error. Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury, under proper instructions, to fix. *Shaffner v. Ehrman, supra*; *Bank v. Goos, supra*; *Rolin v. Steward, supra*; *Bank v. Bowdre, supra*.

Same—Same—
Same—Same.

The trial judge was also in error in the following instruction: "Under the law of this case, the only damage that can be considered by the jury is the damage to the credit of the J. M. James Company with the persons or corporations to whom they gave the checks, as established by the evidence." It is evident that this narrow limitation upon the right of recovery by the plaintiff was in the face of the authorities already referred to. The rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact. And, if this cus-

Same—Same—
Injury to Credit.

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tomor is a merchant or trader, its natural effect is an injury to his business standing, as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages, measured by all the facts in the case.

The court below was further in error in the following instruction: "If the evidence establishes the fact that there was no absolute refusal to pay said checks, but only a request for delay, to look into the condition of the J. M. James Company's account, you will determine from the evidence whether the request was reasonable or was unreasonable, under the facts and circumstances proven. If the request was reasonable, then you will determine whether the delay was reasonable or unreasonable. If you find it to be reasonable, then there can be no recovery in this case. If the request was unreasonable, or the delay was unreasonable, in making an investigation of the account of the J. M. James Company, then there can be recovery in this case." Upon this record, it was the duty of the bank to honor these checks on presentation. No excuse was offered in the court below for a failure to do so. No request for an opportunity to examine the account of this company is shown. There is no pretense that time was needed for examination of the account. In truth, the record discloses that, when presented to the bank's teller, he was at once informed that the company had to its credit funds to make them good. In view of these facts, and the additional fact that they were paid after several hours' delay, this instruction could not have been otherwise than misleading to the jury and prejudicial to the plaintiff. The judgment of the circuit court is reversed, and the cause is remanded.

NOTES.

Wrongful Dishonor of Check—Drawer's Right of Action.—The depositor, as soon as he makes a deposit, becomes a creditor of the bank, for the amount of money deposited, the bank agreeing to discharge the debt so created by honoring and paying the checks or

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orders which the depositor may from time to time draw on it, when presented, not exceeding the amount deposited, the relation between them being simply that of debtor and creditor and without any of the elements of a trust. Hence if the bank should fail to pay the depositor when properly called upon to do so he would have his remedy by proper action. *Hawes v. Blackwell*, 107 N. Car. 196, 22 Am. St. Rep. 870; *Martin v. Minnekahta State Bank*, 7 S. Dak. 263, 64 N. W. 127.

So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. *Nat. Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368.

For a breach of the agreement to honor a depositor's checks the banker is liable to an action by him. *Carr v. Nat. Security Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Fogarties v. State Bank*, 12 Rich. L. (S. Car.) 518, 78 Am. Dec. 468.

It is the bank's duty to pay a check on demand, and for breach of this duty the drawer has a right of action. *Saylor v. Bushong*, 100 Pa. St. 23, 45 Am. Rep. 353.

And this right is not affected by any arrangement between the payee and one of the payee's clerks who had used the authority given him to endorse checks for business purposes to fraudulently endorse them for other purposes. *Citizens' Nat. Bank v. Importers', etc., Nat. Bank*, 49 Hun (N. Y.) 607, 1 N. Y. Supp. 664.

The drawer of a check has a right to recover for the wrongful dishonor of his check, regardless of the holder's right of action. *Nat. Bank of Lebanon v. Boles*, 12 Ky. L. Rep. 422.

A check which had been indorsed by the depositor and credited to his account by his bank was lost while being transmitted to the drawee for payment, and the bank requested the depositor and drawer to furnish a duplicate check, but they failed to comply, whereupon the bank charged the depositor's account with the check and declined to honor a check drawn against his deposit, which would have been sufficient to meet the check if the lost check had not been charged back to him. *Held*, that the bank was liable for failure to honor such check. *Kavanaugh v. Farmers' Bank*, 59 Mo. App. 540. See generally, *Dana v. Third Nat. Bank*, 13 Allen (Mass.) 216, 90 Am. Dec. 216; *Roberts v. Corbin & Co.*, 26 Iowa 315, 96 Am. Dec. 146; *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 35 S. W. Rep. 911; *Citizens' Nat. Bank v. Importers', etc., Nat. Bank*, 44 Hun (N. Y.) 386, *affirmed* 119 N. Y. 195, 23 N. E. Rep. 540; *Birchall v. Third Nat. Bank*, 15 W. N. C. (Pa.) 174; *Vanbibber & Co. v. Bank of Louisiana*, 14 La. Ann. 481, 74 Am. Dec. 442; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417; and cases *infra*, this note.

Notes

Same—Same—Proper Remedy.—Assumpsit for the amount of his deposit or an action for damages, not an action upon the check, is the proper remedy of a depositor whose check has been wrongfully dishonored. *First Nat. Bank v. Shoemaker*, 117 Pa. St. 94, 11 Atl. Rep. 304.

The action may be in tort or in assumpsit. *Marzetti v. Williams*, 1 B. & Ad. 415, 3 Eng. Rul. Cas. 746.

Same—Same—Presentment and Refusal Necessary.—The drawer of a check may have his action against the bank for refusing to honor his check, but not until it has been presented and payment refused. *Purcell v. Allemong*, 22 Gratt. (Va.) 739; *Nat. Comm. Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50.

Same—Same—Demand of Whole Deposit Not Necessary.—“We think that a demand for the whole balance on deposit is not requisite in order to enable the depositor to maintain suit against the bank. The implied contract is that it will pay the deposits when and in such sums as are demanded. Whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive its amount, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises.” *Viets v. Union Nat. Bank*, 101 N. Y. 563, 54 Am. Rep. 743.

Same—Same—Defenses—Effect of Failure of Payee to Indorse.—The failure of the payee to indorse the check is a defense to an action by the drawer for wrongful dishonor. *Rowley v. Nat. Bank*, 63 Hun (N. Y.) 550.

As to the effect of such failure when the refusal to pay is based on a lack of funds, see *Eichner v. Bowery Bank*, 45 N. Y. Supp. 68.

Same—Same—Same—Negligence of Bank Clerk.—The negligence of a clerk of the bank is no defense to such action. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334.

Damages Recoverable by Depositor for Wrongful Dishonor of Check—Substantial Damages.—Substantial damages may be recovered of a banker by a person engaged in trade for a refusal to pay his check when he has sufficient funds on deposit for that purpose even though there is no evidence of malice or special injury to such depositor. *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 134. In this case the court said: “The question therefore, is, what is the measure of a banker’s liability to a person engaged in trade for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice or special injury to the depositor? Authorities are not numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are in such cases recoverable. The leading case is that of *Rolin v. Stewart*, 14 Com. B. 595. In that case there

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was no evidence of malice in fact nor of special damages; but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks, and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the direction to the jury was correct, the case being likened to that of a slander of a person in the way of his trade. WILLIAMS, J., said: 'I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover substantial damages; and when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as in the case of an action for slander of a person in the way of his trade, the action lies without proof of special damages.'

This case was cited with approval in *Prehn v. Royal Bank of Liverpool, L. R.*, 5 Ex. 92, in which MARTIN, B., says: 'Now, with respect to damages in general, they are of three kinds: First, nominal. The second kind is general damages, and their nature is clearly stated by Creswell in *Rolin v. Stewart*, 14 Com. B. 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man.'

In Woods' *Mayne on Damages*, 1st Am. Ed., sec. 8, p. 12, the rule is announced that 'when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damages might be given at once, citing the case of *Rolin v. Stewart*, 14 Com. B. 595; and text-writers, without exception, seem to approve of the rule announced in that case. See Bishop on Non-contract Law, sec. 49; 1 Sutherland on Damages, 129.

In 3 Am. & Eng. Enc. Law, 226, it is said: 'The depositor, by proving special loss, may recover special damages from the bank for its breach of duty; but if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained,' citing authorities. "Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages.' 5 General Digest of the United States

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Ann. 283, citing *Patterson v. Marine Nat. Bank*, 130 Pa. 419; 17 Am. St. Rep. 779, and other authorities. In the Pennsylvania case the point is directly decided. The ground upon which substantial damages is there held recoverable is that of public policy. We have also examined the text-books on the subject of banks and banking within our reach, and find that they uniformly, so far as they treat of the subject, approve of the rule as announced in *Rolin v. Stewart*, 14 Com. B. 595.

We are of opinion that the conclusion in that case was reached by proper reasoning. It is well understood that in an action for slander by a person for the speaking of slanderous words of him in the way of his trade, the fact that he is a trader takes the place of special damages. To return a check marked 'Refused for want of funds' to the holder, especially through a clearing-house, certainly tends to bring the drawer of that check into disrepute as a person engaged in mercantile business, and it needs no argument to show that a single refusal of that kind might often, and frequently does, bring ruin upon a business man; and yet it is no more possible in either case to prove special or actual damages than it is for one charged with the commission of a crime to show specifically in what manner he has been injured."

In *Larios v. Bonany y Gurety* (P. C. 1873), L. R., 5 P. C. 346, it was held that general and substantial damages were recoverable for the breach of an agreement made with the depositor to allow a special credit against securities for the purpose of meeting drafts.

If the drawee refuses to accept when he has funds for the purpose, he becomes liable to the drawer for the wrong done to his credit. *Gammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363.

"A bank is an institution of a quasi-public character. It is chartered by the government for the purpose, *inter alia*, of holding and safely keeping the moneys of individuals and corporations. It receives such moneys upon an implied contract to pay the depositor's checks upon demand. * * * At the same time, the business of the community would be at the mercy of banks if they could at their pleasure refuse to honor their depositor's checks, and then claim that such action was the mere breach of an ordinary contract for which only nominal damages could be recovered, unless special damages were proved. There is something more than a breach of contract in such cases; there is a question of public policy involved, as was said in *First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages." *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 17 Am. St. Rep. 778.

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The amount of a check wrongfully dishonored as well as damages for such wrongful dishonor are recoverable by a depositor who has made such check good to the holder. *First Nat. Bank v. Railsback*, 58 Neb. 248, 16 Bkg. L. J. 223, 78 N. W. 512.

Same—General Damages.—The drawer of a check may recover general damages of the banker for the wrongful dishonor of his check. *Birchall v. Third Nat. Bank*, 15 W. N. C. (Pa.) 174.

Where the drawer of a check is a trader or merchant and has sufficient funds on deposit to meet the check, he may recover general damages for the wrongful dishonor of the check, on the ground that the wrongful dishonor imputes insolvency, dishonesty, or bad faith to the drawer and has the effect of slandering him in his business. *Svensden v. State Bank*, 64 Minn. 40, 31 L. R. A. 552, 65 N. W. 1086. See *Larios v. Bonany y Gurety* (P. C. 1873), L. R., 5 P. C. 346.

Same—Heavy Damages.—The banker is bound by his contract with his customer to honor the check, when he has sufficient assets in his hands; if he does not fulfill his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. *Hopkinson v. Forster*, L. R., 19 Eq. 74, 3 Eng. Rul. Cas. 755.

Same—Temperate Damages.—"Temperate" damages may be recovered for the wrongful dishonor of a check, even though there is no proof of special damages. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. Rep. 190.

Same—Damages Reasonably Chargeable to Breach.—The measure of damages for the refusal to pay a check drawn upon a bank which had sufficient funds of the drawer for that purpose is such damages as might fairly and reasonably be considered as arising from a breach of the contract according to the usual course of things. *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. Rep. 84, 23 L. R. A. 190; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419.

Same—Nominal Damages.—The banker contracts with his customer that he will pay checks drawn by him, provided he, the banker, has money in his hands belonging to that customer, and for a breach of such contract nominal damages may be recovered. *Marzetti v. Williams*, 1 B. & Ad. 415, 3 Eng. Rul. Cas. 746.

Only nominal damages are recoverable for the wrongful dishonor of a check which was paid five days afterwards. *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun (N. Y.) 6, 33 N. Y. Supp. 864; *Brooke v. Tradesmen's Nat. Bank*, 69 Hun (N. Y.) 202.

Exemplary damages cannot be based on a judgment of \$1 actual damages for injury to a depositor's credit caused by the wrongful dishonor of a check, as such judgment is for a nominal sum only. *First Nat. Bank v. Kansas Grain Co.*, 60 Kan. 30, 55 Pac. Rep. 277.

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Same—Malice Inferable.—Malice may be legally inferred from the wrongful dishonor of a depositor's check four successive times when he has sufficient funds on deposit and there is no reasonable excuse for such dishonor. *Davis v. Standard Nat. Bank*, 63 N. Y. Supp. 764, 50 App. Div. 210.

In *Schaffner v. Ehrman*, 139 Ill. 109, 32 Am. St. Rep. 192, 15 L. R. A. 134, it was held that malice need not be proven.

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v.

NORTHWESTERN NAT. BANK.

(*Supreme Court of Pennsylvania, May 21, 1900.*)

Checks—Forged Indorsement—Liability of Collecting Bank.*—A. was introduced to a trust company by a responsible party as B. The company, in the pursuance of a business transaction, gave A. its check drawn on itself to the order of B. This check, fraudulently indorsed in the name of B., was deposited in the defendant bank by R., who had opened an account with it, and was collected by the bank of the trust company, and its proceeds drawn out of the bank by R. So far as it appeared from the evidence, all parties to the transaction acted in good faith, except A. *Held*, that the trust company could not recover from the bank the money paid on the check.

APPEAL by defendant from Philadelphia county common pleas court. *Reversed.*

Richard C. Dale and *Alfred Moore*, for appellant.

John G. Johnson, for appellee.

FELL, J. The fraudulent transaction which gave rise to this litigation may be briefly stated: Dr. Herman S. Bissey was the owner of premises No. 2352 North Broad street, Philadelphia, which he wished to sell. A man who gave his name as Ashley called on Dr. Bissey, and, under the pretense of desiring to purchase the property, got pos-

*See note, 2 Banking Cases 94 *et seq.*

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session of the title papers, and took them to a responsible conveyancer, to whom he applied for a loan of \$5,000, to be secured by a mortgage of the property. The conveyancer, believing the man to be Dr. Bissey and the owner of the premises, negotiated the loan. The mortgagee, desiring title insurance by the Land-Title & Trust Company, deposited with it the amount of the loan, to be paid to the mortgagor when a valid mortgage should be executed. When the matter was ready for settlement, Ashley went with his conveyancer to the office of the company, and was there introduced to the settlement clerk as Dr. Bissey. He signed the mortgage, "Herman S. Bissey," acknowledged it before a notary connected with the company, and received from the clerk the company's check, drawn on itself to the order of Herman S. Bissey. This check, indorsed, "Herman S. Bissey," was deposited in the Northwestern National Bank by a person who had opened an account with it as G. B. Rogers, and was collected by the bank of the trust company in the usual course of business. Whether Ashley and Rogers were the same person, or different persons who had conspired to defraud the trust company, and had opened an account with the bank as a means to that end, or whether Rogers was a person who was innocent in the matter, did not appear at the trial. Dr. Bissey had no knowledge of the mortgage until called on six months later for the interest. All of the parties to the transaction, except Ashley, and possibly Rogers, if he were a different person, acted in good faith, and in that reliance on the good faith of others which is usual in such matters. Ashley by some means induced a well-known and reputable conveyancer to believe that he was Dr. Bissey. The business followed the usual routine by which hundreds of such transactions are carried on every day, and nothing occurred during its course to put the other parties on their guard. On discovering the fraud which had been practiced upon it, the trust company notified the bank, and demanded the return of the money paid on the check, and, on the refusal of the bank,

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brought this suit. At the trial a verdict was directed for the plaintiff.

The case, as presented by the plaintiff's declaration, is that of the payment by the plaintiff of a check drawn on it by a depositor to the order of a third person, whose indorsement was forged, the payment having been made in reliance upon the subsequent indorsement of the defendant; the ground of liability being that the defendant, by its indorsement and presentation, warranted the genuineness of the indorsement of the payee, Herman S. Bissey. While by this statement of the case the trust company is considered as a banker only, while in fact it was both the banker and the drawer of the check, it fairly presents the fundamental question involved. A recovery must be had on the ground alleged, or not at all.

Generally a bank is not bound to know the signature of the indorser of a check, and, if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid, if it proceeds promptly on discovery of the fraud. This is upon the principle that the indorsement of a check is an implied warranty of the genuineness of the previous indorsements. But, in order that a bank may recover, it must appear that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing, and has no cause of action. The question is, then, the same, whether we consider the check as having been drawn by an ordinary depositor in the trust company, or as having been drawn, as it was, by the real-estate department of the company, on the banking department. While, as between the bank and the trust company, a banker, the former is bound by its implied warranty of the indorsement, still there is no cause of action unless the payment of the check was not, as against the drawer of the check, a good payment. The reason of the rule that when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds, and cannot charge the payment to the depositor's account, is that there is an implied

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agreement by the bank with its depositor that it will not disburse the money standing to his credit, except on his order. The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one whom he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First. Because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely-increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. The bank is deprived of the protection afforded by the fact that a *bona fide* holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge. Secondly. Because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid, to whom he intended payment should be made. There has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error, into which he was led by the deception previously practiced upon him.

It is somewhat surprising that the question presented by this case has not arisen more frequently. There are but few decisions upon it, and none in this state. But the views which we have expressed are in entire harmony with the principles which we have recognized as governing the decision of cases arising from the forgery of notes and checks, and involving kindred questions. Among the more recent

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of these is *Iron City Bank v. Ft. Pitt Nat. Bank*, 159 Pa. St. 47, 28 Atl. 197, in which the cases are reviewed by our BROTHER MITCHELL, and it is said by him: "It is always a good defense that the loss complained of is the result of the complainant's own fault or neglect; and it would require a statute in very explicit terms to do away with so universal a principle of law, founded on so incontestable a principle of justice." In *Bank v. Vagliano* [1891] App. Cas. 107, the bank had been induced to pay by notice from Vagliano Bros. of the drawing and acceptance of the draft, and, as the case differs from this in that important particular, it cannot be cited as a precedent. But the opinions of the lords are instructive on the questions involved in this case, and the principles announced by them would settle the contention in favor of the defendant. LORD SELBORNE said: "It is not, as I understand, disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances. The fact that there was no real payee might be another." There are, however, decisions in other states which are directly in point. In *Bank v. Shotwell*, 35 Kan. 360, 11 Atl. 141, the facts are almost identical with those in this case. An unknown person, who represented himself to be Guernesy, who was the owner of a quarter section of land, obtained from Shotwell a loan secured by mortgage on Guernesy's land, and received from Shotwell in payment a draft drawn to the order of Guernesy. He indorsed Guernesy's name on the draft, and sold it to the bank. In an action by Shotwell to recover of the bank the amount received by it on the draft, it was held that, although Shotwell was deceived in the transaction, the person with whom he dealt was the person intended by him as the payee of the draft, designated by the name he assumed in obtaining the loan, and that his indorse-

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ment was the indorsement of the payee named. It is said in the opinion: "The vital point in this case is that Shotwell intended the draft to be sent to the party executing the notes and mortgage, and intended it to be paid to the person to whom he sent it, and whom he designated by the name of Daniel Guernesey because that was the name he assumed in executing the notes and mortgage; and therefore the national bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernesey." In *Maloney v. Clark*, 6 Kan. 82, the plaintiff was induced to send a draft drawn to the order of his brother to a stranger, who in the correspondence had personated his brother. The stranger indorsed the name of the plaintiff's brother on the draft, and sold it to the defendants, who were bankers. It was held that under these facts the plaintiff could not recover. In *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, a person who assumed the name of Barney took to Coleman, an auctioneer, a stolen horse and buggy, to be sold. Before selling them, Coleman made inquiry, and received a favorable report of the standing of the real owner of the assumed name. After the sale he gave a check, drawn to the order of Barney, to the person for whom he sold the team, who indorsed it and parted with it for value. Payment of the check having been stopped, suit was brought by the holder against Coleman, and a recovery had. In the opinion it was said, "It is clear from the facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was intended by them as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name." It would follow, under this reasoning, that if the check had been paid by the bank it would have been a good payment. In the case of *U. S. v. National Exch. Bank*, 45 Fed. 163, decided by the circuit court of the United States for the Eastern district of Wisconsin, it was held that a bank was not liable

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for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. Shuman had, by fraud, obtained possession of a post-office money order drawn in favor of Erben, on which he forged Erben's indorsement, and in payment of the order received a check from the postmaster, drawn on the bank defendant, to the order of Erben, on which he forged Erben's indorsement, and it was paid by the bank. This decision, as the others cited, is put upon the ground that the intention of the drawer of the check was that it should be paid to the person to whom he delivered it. There are a number of other cases which more or less directly recognize the principle on which these decisions are based, but in which there is no direct ruling on the subject, and we have found none which express a contrary view.

The facts of this case do not, we think, bring it within the rule that a bank paying a check to order on a forged indorsement may not charge the payment to the drawer's account, for the reason that the check was issued to the person whom the drawer intended to designate as the payee. If not within the rule, the plaintiff has no standing whatever. It is a perverted statement of the whole transaction to say that the check was intended for Dr. Herman S. Bissey, and that he alone was entitled to receive payment. Dr. Bissey had no more right to the check than had Ashley. He had given nothing for it. No one was entitled to it, and, had the truth been known, it would not have been issued. Under the supposed facts on which the trust company acted, Ashley was the owner of the property, he had executed a mortgage, and was entitled to payment. The clear intention was to pay him, although there was a mistake as to the facts on which the intention was based. Nor is the solution of the question involved to be sought in determining whether the bank was negligent in dealing with its depositor, Rogers. This was suggested at the argument, but mainly as a makeweight.

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The case was not presented or argued on that ground, and in view of the principles by which the question of liability must be determined, and of the facts as shown at the trial, it could not have been. The true ground of liability, if any existed, was that the bank collected of the trust company a check drawn to order, on which the indorsement was forged. Between the bank and the trust company, as the drawer of the check, no relation, contractual or otherwise, existed. The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. The remedy of the drawer is against the bank which pays his check, and the bank's remedy is against the person to whom it paid. The liability of the party collecting the check arises from his implied warranty of the indorsement. This liability is founded on contract, and not on negligence, and it exists, if at all, whether there was negligence or not. But if we consider the question in this light the plaintiff has no case. The fraud was, in effect, consummated when the check was delivered to Ashley. He would have received money instead of a check if he had asked for it, or he could have drawn the money in the banking department, in an adjoining room. Any right of the trust company to recover must rest on the assumption of its entire good faith and innocence, and, if it gave a check to Ashley with any reservation or doubt as to his honesty in the transaction, it is estopped by the fact that it gave, to one of whom it had reason to be suspicious, the means of perpetrating a fraud on others. The officers of the trust company, of course, had no doubt. They acted in entire good faith, and, it may be conceded, with ordinary prudence; but the loss was occasioned by their error, and there is no reason, legal or equitable, why it should be shifted to another. The judgment is reversed.

DEAN, J. (dissenting). A man representing himself as John Ashley called upon Dr. Herman S. Bissey, at his residence, 1630 North Sixteenth street, in the city of Philadel-

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phia. He was entirely unknown to Bissey, but pretended that he desired to purchase a house and lot, No. 2352 North Broad street,—a property owned by Bissey, and which he wanted to sell. They agreed on the terms, and Ashley got from Bissey his deed for the premises, on the pretense that he wanted to have it examined, and took it away with him; first, however, paying \$5 on account. With the deed in his possession, Ashley called upon R. Taylor Middleton, a real-estate broker of unquestioned good character, and, representing himself as Dr. Herman S. Bissey, the grantee in the deed, opened with him negotiations for a loan of \$5,000 on a mortgage of the property. Bissey was unknown to Middleton, and the latter, assuming the truthfulness of the representations, introduced Ashley to the Land-Title & Trust Company, this plaintiff, as Bissey, the grantee in the deed, that he might procure a title insurance policy on the premises, and also as a party who might place for him the mortgage loan. Bissey was wholly unknown to the officers of the company. The title was insured, and the loan granted. The “title department” of the company took the mortgage, and delivered to the pretended mortgagor, Bissey, its check, as follows: “Philadelphia, Nov. 1, 1897. The Land-Title and Trust Company: Pay to the order of Herman S. Bissey four thousand nine hundred and twenty-two and 25/100 dollars, pro. of mtg. on No. 2352 N. Broad St. William R. Nicholson, President. J. Lord Rigby, Settlement Clerk. \$4,922.25.” The pretended Bissey then forged the name of Herman S. Bissey on the back of the check, and followed this with the indorsement of name G. B. Rogers, and presented it for deposit to the account of the latter at the Northwestern National Bank, this appellant. The bank accepted it, indorsed it for collection, and by its messenger sent it back to the title company, by whom it was paid in the ordinary course of business. The man who assumed the name of Rogers soon after, by checks on the national bank, drew out the money. In about six months thereafter the title company discovered the forgery of Bissey’s name, and the worth-

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lessness of the mortgage. Demand for payment being refused by the national bank, this suit was brought. There was no dispute as to the facts. The court below directed the jury to find for plaintiff, and we have this appeal by the national bank, defendant, assigning for error the peremptory instruction of the court below.

A majority of my Brethren are of opinion the court erred. I think it was right. I put the case wholly upon the principle or rule that, where one of two innocent persons must suffer by the wrong of a third, he shall stand the loss whose fault or neglect made the loss possible. Now, notice the facts, as concerns the Land-Title Company: It transacts business of millions of dollars annually in a large city, insures titles, and places mortgages. Probably not one-tenth of those who deal with it are personally known to its officers. How shall it identify them, and thus guard against swindlers? It seems to me, the only practicable way is to have its customers introduced by reputable business men, who are known to the officers. That was the method pursued here. Mr. Middleton, well known to the bank, who had himself been imposed upon, introduced the swindler to the title company as Dr. Herman S. Bissey, the owner of premises No. 2352, and this pretended Bissey had the deed in his possession. Shall the company call in other reputable business men to corroborate one whose prudence and integrity are unquestioned? The company, in the exercise of all the care that any reasonable rule of law or business conduct required, necessarily assumed that Mr. Middleton represented the truth when he said to them, in effect, "This man is Dr. Herman S. Bissey, the owner of premises 2352 North Broad street." It is argued that if the title company had paid in bank bills, instead of by check, it would have been the loser. A sufficient answer to this is that it did not pay in bank bills, but by check. A conjecture as to what might have been the case on some other state of facts helps us not in determining the issue. We may conjecture that if, without being identified by one well known to it, the title company had assumed the identity of Bissey from the mere possession

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by him of the deed, the loss would have been its own. But, to impose the penalty, we must assume some degree of fault or neglect on part of the title company. The proof is undisputedly the other way. It did not pay the swindler the money. It did not deliver to him its check until his identity was vouched for by one in every way worthy of belief. The pretended Bissey had the check. He, with very rare exceptions, could not have drawn the money at any bank teller's window in this city without proof of identity; that is, that he was Dr. Herman S. Bissey, the payee. It is argued that if the swindler had gone from the "title department" to the company's paying teller, in the same building, it would have been cashed without proof of identity. If he had done so, and received the money, that would have been the fault of the paying teller; and, of course, the title company would have had to bear the loss. But he did not present it to the paying teller of the drawer. Why? Because, it is fair to assume, he wanted no questions asked by one who might know the real Bissey, or require that some one vouch for him as the real Bissey. In fact, he had concocted and prepared a plan to cheat the defendant bank,—one by which he could get the check cashed without identification. We take the testimony of defendant's cashier. He says the check drawn November 1st in favor of Bissey was received by him on deposit, November 3d, from George B. Rogers, it having been previously indorsed by Bissey. Being the second indorser, the cashier had a right to assume that Rogers guarantied the genuineness of Bissey's signature, the payee; but who was Rogers, who guarantied the genuineness of the indorsement of the payee in a \$5,000 check? The cashier says: A man representing himself to be Rogers called at the bank, with his wife, less than three weeks before, and rented a safe-deposit box, with instructions that his wife was to have access to it. He had no introduction, but said he lived in the neighborhood, and told a "pretty straight story." The bank designated a box for him. The assumed Rogers then came several times, and apparently

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used the box; then, on November 3d, as we have said, less than three weeks afterwards, deposited the Land-Title check; in about four weeks more, drew it all out, but 25 cents. The bank had not heard of or known him before the renting of the box. It has not heard of him since he drew the last check. Whether his real name was Rogers, except from the "pretty straight story" he told the cashier, no one knows, for the bank made no further inquiry. Whether he ever did business in Philadelphia, or resided in the neighborhood of the bank, no one knows, for inquiry since has resulted in no information. Yet this defendant bank, on the guaranty of a total stranger, accepts as genuine the forged indorsement of Bissey, and, in collecting the check, represents to the Land-Title Company, by its own indorsement, that the preceding ones are genuine. It could not have got the money out of which it was defrauded, unless it had done so. On these facts,—and not a single one of them is disputed,—whose neglect enabled the wrongdoer to successfully perpetrate the cheat? The title company did not accept a "pretty straight story" from him. Middleton had to introduce and vouch for him. He did not present the check to the paying teller of that company when he had possession of it; for, as stated by Mr. Nicholson, the president, that officer had nothing whatever to do with, or knowledge concerning, the operations of the real-estate department. The wrongdoer believed or feared identification would be required there. He preferred the bank, which believed a total stranger's "pretty straight story"; and the result shows that, while his conduct was crooked, his judgment was correct. Every one connected with this transaction was deceived by the pretexts of the swindler, except the Land-Title Company,—the one now, by the judgment of this court, made to suffer. Dr. Bissey, allured by the prospects of a sale, trusts a total stranger with possession of his deed. Mr. Middleton believes he is Dr. Bissey, because he says so, and exhibits Bissey's deed. The defendant believes he is Rogers, because he says so, rents him a box, opens with him an account, and accepts

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his say-so as to the genuineness of Bissey's forged signature, undoubtedly forged by himself. The title company believes nothing he says. It does believe what Middleton says, for it could not do otherwise without practically stopping business. The fraud was only possible, in view of the undisputed facts, because of the childish credulity and consequent neglect of the most ordinary business precautions by defendant. I would affirm the judgment.

GREEN, C. J. I concur in the foregoing dissenting opinion.

(May 29, 1900.)

PER CURIAM. *In re* petition to amend the judgment of the supreme court by adding thereto the words "and a *venire facias de novo* shall issue." Judgment amended by granting new *venire* as prayed for.

McDONALD

v.

STATE OF NEBRASKA.

(Circuit Court of Appeals, Eighth Circuit, March 19, 1900.)

Deposits—Public Money—Trust Fund.*—State funds were deposited in a national bank, by and through the state treasurer, and he took from the bank certificates of deposit for the sum deposited, payable to the state treasurer in his official capacity; and subsequently his successor in office returned to the bank such certificates, and the amount thereof was placed to the credit of the state treasurer on the books of the bank. Prior to the failure of the bank a certain amount of the state money had been checked out, leaving a balance of the money belonging to the state in the bank at the date of its failure. *Held*, that the bank and its receiver were liable for such balance.

*See State *ex rel.* Anderson v. Thum (Idaho), 1 Banking Cas. 481, and *note*, 497; First Nat. Bank. v. C. Bunting & Co. (Idaho), 2 Banking Cas. 239.

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Same—Action against Receiver — Federal Jurisdiction.—Every action brought against a receiver of a national bank in his official capacity arises under the laws of the United States.

Same—Action against Receiver for State Funds—Parties.—In an action against the receiver of a national bank to recover money belonging to the state on deposit in the bank at the date of its failure, defendant having successfully contended that the treasurer of the state, in his official capacity, was not, and the state was, the proper party to maintain the action, could not subsequently assume a contrary position.

Same — Same — Same — Amendments — Limitations. — Under the Code system of Nebraska, and by section 954, Rev. St. U. S., in such an action by the state treasurer in his official capacity, the court is authorized to allow an amendment substituting the state as plaintiff. And such an amendment has relation to the commencement of the action, and leaves no interval for the statute of limitations to intervene.

ERROR by defendant to the circuit court of the United States for the district of Nebraska. *Affirmed.*

The state of Nebraska, by and through her state treasurer, deposited in the Capital National Bank of Lincoln, Neb., in money which belonged to the state, the sum of \$285,351.85, and took from the bank certificates of deposit for the sum, payable to the state treasurer in his official capacity. Case Stated. The incumbent of the office of treasurer of state was changed from time to time. On the 16th day of January, 1893, the then state treasurer returned to the bank the certificates of deposit for the money of the state previously deposited by his predecessor in office, and the amount thereof was placed to the credit of the treasurer of state on the books of the bank. On the 20th of January, 1893, the bank failed. Prior to its failure, the sum of \$48,990.02 of the state money deposited in the bank had been checked out, leaving the sum of \$236,361.83 belonging to the state in the bank on the date of its failure. Soon after the failure of the bank, the comptroller of the currency, in pursuance of the powers conferred on him by the act of congress in that behalf, appointed a receiver for the bank. The treasurer of the state, in his official capacity and on behalf of the state, twice presented to

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the receiver of the bank for allowance the claim for the money of the state which the bank held at the date of its failure, namely, \$236,361.83. That officer refused to allow the claim. After the receiver refused to allow the same, the treasurer of state, in his official capacity, brought this suit against the receiver to recover this sum of money for the state. The term of office of the treasurer who brought the suit expired, and his successor in office, John B. Meserve, was substituted as plaintiff. Demurrers to the petition and amended petition were filed, one ground of which was that the treasurer of state had no legal capacity to sue for the money, but that the suit should be brought by and in the name of the state. This ground of demurrer was sustained by the court, and thereupon, by leave of the court, the name of the state of Nebraska was substituted as plaintiff in the action for that of her treasurer, and the petition was amended accordingly. A demurrer was filed to this amended petition, which was afterwards, by leave of the court, withdrawn, and the defendant filed a motion to strike the amended petition from the files for various reasons, which was overruled; and a demurrer was then filed to the amended petition substituting the state as the plaintiff in the action, which was also overruled. Afterwards the defendant filed an answer, and the case was tried to a jury, resulting in a verdict and judgment for the plaintiff for \$236,361.83, this being the balance of the state money deposited in the bank by the treasurer of the state, and remaining there at the date of the bank's failure; and thereupon the defendant sued out this writ of error.

G. M. Lambertson and A. E. Harvey (Frank M. Hall, on the brief), for plaintiff in error.

C. J. Smyth, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The indisputable facts having relation to the merits of this case are: That the state of Nebraska, by her treasurer,

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deposited in the Capital National Bank of Lincoln, Neb., money of the state amounting to the sum of \$285,351.85. There is no pretense that this deposit was not made, or that it was not the money of the state. There is no pretense that the bank ever paid this money back to the state, or to any officer of the state, or to any person whomsoever, except the sum of \$48,990.02; and there is no pretense that the bank was not indebted to the state, at the time of its failure, on account of the money of the state thus deposited in the bank, in the sum of \$236,361.83. In view of these indisputable facts, the attitude of the receiver in this case is not one which commends itself to the court. He is a public officer, charged with the duty of collecting the assets of the insolvent bank and disbursing the same *pro rata* among its honest creditors. Why a public officer charged with such a trust should refuse to allow the claim of the state of Nebraska for the actual money of the state deposited in the bank by her treasurer in his official capacity, and remaining therein at the date of the bank's failure, passes our comprehension. Why should the assets of the bank, already grossly inadequate to discharge its obligations, be further diminished by incurring costs and attorney's fees in resisting such a confessedly just and meritorious claim?

Something is said in the record and briefs about the certificates of deposit issued by the bank for the money of the state when it was deposited in the bank. Concerning these certificates, it is enough to say that they were returned to the bank by the treasurer of state, but the money they represented—and they represented an actual deposit of money—was not repaid to the state or her treasurer, but remained in the bank to the credit of the treasurer of state in his official capacity. Whatever bearing these certificates of deposit may have on the question of the liability of the different treasurers of state through whose hands they passed, or on the liability of the sureties on the bonds of these treasurers, or on the liability of the sureties of the bank on the bond

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given to the state to secure money deposited in the bank by the state, they cut no figure at all in the case against the bank or its receiver. With or without certificates of deposit, and without regard to what may be the liabilities of others to the state for this money, the bank and its receiver are unquestionably liable therefor. No defenses going to the actual merits of the cause of action are interposed. Certain technical defenses are set up, which will now be considered.

It is contended that the court had no jurisdiction of the action; that the receiver was not liable to be sued in the circuit court. But the action is one arising under the laws of the United States, and for that reason was properly brought in the federal court. A receiver of a national bank appointed by the comptroller of the currency in pursuance of the act of congress is charged by the laws of the United States with the execution of certain duties in the performance of which he acts as an agent and officer of the United States. His office is created and his duties defined by an act of congress. In contemplation of law every action brought by or against him in his official capacity arises under the laws of the United States. This action is brought against the receiver in his official capacity for an alleged breach of his official duty to the plaintiff imposed on him by the laws of the United States, and the circuit court had undoubted jurisdiction of the case. *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Price v. Abbott* (C. C.), 17 Fed. 506 (opinion by MR. JUSTICE GRAY); *Platt v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215; *Stanton v. Wilkeson*, 8 Ben. 357, Fed. Cas. No. 13,299; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Bank v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *Armstrong v. Ettlesohn* (C. C.), 36 Fed. 20; *Stevens v. Bernays* (D. C.), 41 Fed. 401; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; *Hot Springs Independent School Dist. v. First Nat. Bank* (C. C.), 61 Fed. 417. If the action had been brought in the state court, it scarcely admits of a doubt that the receiver

Same—Action
against Receiver
—Federal
Jurisdiction.

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would promptly have removed it into the federal court. Costs and delay were saved by bringing it in that court in the first instance.

Other contentions of the plaintiff in error are that the substitution of the state of Nebraska as plaintiff in the action was a change of the cause of action, and was equivalent to the bringing of a new action, and that, as the statute of limitations had run against the plaintiff's claim before the substitution was made, the cause of action is barred. It is not now material to inquire whether the suit was not properly brought, in the first instance, in the name of the treasurer of the state. The receiver insisted that the treasurer of state, in his official capacity, was not, and the state was, the proper party to maintain the suit on the cause of action set out in the petition. Having assumed that position, and succeeded in maintaining it, he cannot now assume a contrary position.

Same—Action
against Receiver
for State Funds
—Parties.

The state of Nebraska early adopted the reformed system of pleadings, and there is probably no state in the Union whose courts have given to that system a more liberal and enlightened interpretation, or one more in harmony with its obvious, and, we may say, expressed, purpose and intent. The Code of that state abolishes all common-law forms of actions, and, in common with the Codes of many other states, contains these provisions:

Same—Same—
Same—Amend-
ments—Limita-
tions.

“Sec. 144. The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting any mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect to the provisions

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of this Code, the court may permit the same to be made conformable thereto, by amendment.

"Sec. 145. The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Beyond all question these provisions authorized the court to allow the amendment that was made in this case. Not only so, but when the court ruled that the action should be prosecuted in the name of the state of Nebraska it was its duty to allow the amendment substituting the state as the plaintiff in the action. Section 145 is mandatory. It declares the court "must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Under the Code in Nebraska there is no such thing as a vested right in a technical error or defect in the pleading or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. Whether the judicial demand upon the bank and its receiver to repay to the state the money of the state which the bank had received and retained should be made in the name of the state or in the name of the treasurer of the state in his official capacity was purely a technical legal question, which in no wise related to the merits of the cause of action. The cause of action was not changed in the slightest degree by substituting the state of Nebraska as plaintiff in place of the treasurer of state. The cause of action declared on was the same in the original and amended petitions. The petition of the treasurer of state sought to recover of the bank and its receiver, for the state, the money of the state which had been deposited in the bank, and which the bank had never returned to the state. When the name of the state was substituted for that of her treasurer, precisely the same cause of action was counted on, and the same relief asked. The amendment merely substituted the name of the state, who was the real party in interest, for that of her fiscal

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agent. In the receipt and disbursement of the public funds the state can only act by and through her officers and agents. The money, if any, recovered in this action, must be received and receipted for and deposited in the state treasury by the proper fiscal agent of the state, who is undoubtedly the state treasurer; and the receipt of the treasurer of state to the bank or its receiver for the money sued for in this action would be a good quietus for the same.

Outside of the usual and necessary formal parts of the petition, there were but two averments essential to constitute a statement of a good cause of action in this case: One, that the state, by and through her treasurer, had deposited in the bank the money of the state to the amount of \$236,361.83; and the other that the bank and its receiver retained the money, and refused to repay it; and, in substance, this is what is stated in the original and amended petition. The receiver's objection, which resulted in substituting the name of the state as the plaintiff in the action, was not that the state was the proper party to maintain a suit on some other cause of action than that declared on in the petition of the state treasurer, but it was that the state was the proper party plaintiff in that suit, and for the very cause of action declared on in the petition of the treasurer of state. It is obvious, therefore, that the substitution of the state as the plaintiff in the action worked no change whatever in the cause of action.

The views we have expressed are in harmony with the decisions of the supreme court of Nebraska. In an early case in that state (*Martin v. Coppock*, 4 Neb. 173) the supreme court held that the summons might be amended after service thereof on defendant by changing the plaintiff's name from Isaac Coppock to Isaiah Coppock. The court, speaking by JUDGE MAXWELL, said: "The mistake in the name of Coppock could not have misled Martin, but when the amendment to the summons was made it related back to the time of service;" and the court characterized the defense in the case as "purely technical." In *Reed v. Beardsly*, 6

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Neb. 493, the action was brought against three persons as partners, and, when the proof disclosed that the cause of action was against one of the defendants individually, and not against the firm, the court permitted the plaintiff to amend his petition by striking out the name of the firm and the other defendants, and the supreme court said, "This amendment was clearly within the discretion of the court, and was properly allowed," and, after quoting section 144 of the Code of Civil Procedure, the court declared, "A discretion of wider range could hardly be given to the court." In *Herron v. Cole*, 25 Neb. 692, 41 N. W. 765, the action was brought in the name of "Cole Brothers" as plaintiffs, and the court permitted the petition to be amended so as to make "Cole Brothers, a corporation duly organized and existing under the laws of the state of Iowa," the plaintiff in the action, thus changing the plaintiff from a natural to an artificial person. In *McKeighan v. Hopkins*, 19 Neb. 33, 26 N. W. 614, an action of ejectment was, by amendment of the petition, changed into a bill to redeem. The court, speaking by JUDGE MAXWELL, said:

"The Code abolished the distinction between actions at law and suits in equity. If, therefore, an action at law is brought to recover a tract of land, the court certainly has the power to permit the plaintiff to amend his petition, so that he may recover the same either at law or in equity. The right to be enforced is the same in either case,—the recovery of the land,—and, so long as the identity of the cause of action is preserved, the petition may be amended by stating such facts as the plaintiff may believe to exist in his favor to entitle him to the relief sought. The restriction in the section above quoted does not refer to the form of the remedy, but the identity of the transaction."

And in answer to the same contention that is made by the receiver in this case, namely, that the amendment must be treated as the beginning of a new suit, and that, so treating it, the cause of action was barred by the statute of limitations before the amendment was allowed, the court said:

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“The appellee claims, however, that, even if it is conceded that the court had authority to authorize the amendment in question, still the statute of limitations would run against the cause of action until the amended petition was filed. In *Martin v. Coppock*, 4 Neb. 173, it was held that the amendment of a mistake in the name of the plaintiff related back to the date of the service, and this, we think, is the general rule. The cause of action is the same although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitations ceased to run when the summons which was served on him was issued, or, if the service was constructive, at the date of the first publication of the notice.”

But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had

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emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring to this section of the judiciary act, the supreme court of the United States, speaking by MR. JUSTICE STORY, said :

“The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.), and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy.” *Matheson's Adm'rs v. Grant's Adm'r*, 2 How. 263, 281, 11 L. Ed. 261.

And MR. JUSTICE MILLER, speaking from the circuit bench, declared:

“This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory.”

Under section 954 of the Revised Statutes the right of amendment extends to the “summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,” and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by this section to make amendments is disclosed by a long line of decisions of the supreme court of the United States covering every step in a case from the summons to the verdict and judgment. *The Caroline v. U. S.*, 7 Cranch 495, 3 L. Ed. 417; *Jackson v. Ashton*, 10 Pet. 480, 8 L. Ed. 898; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918; *Conrad v. Griffey*, 11 How. 480, 14 L. Ed. 835; *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Tilton v. Cofeild*,

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93 U. S. 163, 23 L. Ed. 858; *Bamberger v. Terry*, 103 U. S. 40, 26 L. Ed. 317; *Dow v. Humbert*, 91 U. S. 294-297, 23 L. Ed. 368; *Construction Co. v. Seymour*, 91 U. S. 646-655, 23 L. Ed. 341; *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. Other United States courts have given their sanction to the most liberal exercise of this power. *Erstein v. Rothschild* (C. C.), 22 Fed. 61 (the opinion is by MR. JUSTICE MATTHEWS); *Bowden v. Burnham*, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 752; *Smith v. Railway Co.*, 12 U. S. App. 426, 5 C. C. A. 557, 56 Fed. 458; *Carnegie, Phipps & Co. v. Hulbert*, 36 U. S. App. 81-97, 16 C. C. A. 498, 70 Fed. 209; *People's Saving Bank & Trust Co. v. Batchelder Egg-Case Co.*, 4 U. S. App. 603, 2 C. C. A. 126, 51 Fed. 130; *Tiernan v. Woodruff*, 5 McLean 135, Fed. Cas. No. 14,027; *Swatzel v. Arnold*, 1 Woolw. 383, Fed. Cas. No. 13,682.

A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the

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statute of limitations. An action was brought in the name of one member of a firm upon a cause of action belonging to the firm, and it was held in *Dixon v. Dixon*, 19 Iowa 512, that the court below erred in not permitting an amendment substituting the firm as plaintiffs in the action. The court said:

"The jury found that the defendant justly owed the money; but, in the opinion of the court below, the technical right to recover was not in the plaintiff, and thereupon the plaintiff, being interested, sought to amend, by adding the name of his partner, or firm name, and thus bring his right to recover within technical law as well as rest it upon broad justice. There is one fact of controlling influence in the determination of this case, and that is, it appears from the papers in the case that, unless the plaintiff is permitted to amend, and continue the prosecution of the claim in this suit, it will be barred by the statute of limitations. The jury found that the defendant justly owes the claim, and to permit the plaintiff to amend and recover such just claim will be more evidently in the furtherance of justice than to refuse the amendment and dismiss the action, as did the court below, and thereby defeat the recovery of a claim the justice of which has already been established."

This ruling was reaffirmed by the court in the case of *Hodges v. Kimball*, 49 Iowa 577.

In *Insurance Co. v. Mueller*, 77 Ill. 22, it was held that where an administrator sued upon a policy of insurance the widow and heirs of the assured might be substituted as plaintiffs in the action.

In *Lake Erie & W. R. Co. v. Town of Boswell* (Ind. Sup.), 36 N. E. 1103, the court permitted the substitution of the town of Boswell as plaintiff in lieu of the trustees of the town.

In *Wood v. Circuit Judge*, 84 Mich. 521, 47 N. W. 1103, in a suit upon an insurance policy, the heirs of the deceased were substituted for the administrator of the assured.

In *McLewis v. Ferguson*, 59 Ga. 644, the action was

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erroneously brought and prosecuted to judgment in the name of the sheriff as plaintiff. The supreme court, CHIEF JUSTICE BLECKLEY delivering the opinion, held the sheriff a mere nominal party, "a stranger in a strange land," and directed the name of the sheriff to be stricken out as plaintiff, and that of the real party in interest substituted, and affirmed the judgment of the lower court. Other cases in that state are to the same effect. *Wilson v. Presbyterian Church*, 56 Ga. 554; *Childers v. Adams*, 42 Ga. 352.

In *Miller v. Pollock*, 99 Pa. St. 202, the action was brought by one having no interest in the cause of action, and the court allowed an amendment substituting the real party in interest as plaintiff. The court said:

"Our statutes of amendments have been liberally construed, and it has been repeatedly held that parties might be stricken out or added whenever, by so doing, the cause can be tried on its merits; and the right to so amend is not confined to a mere mistake of fact in the name of the party. As is said in *Com. v. Dillon*, *81 Pa. St. 44: 'An action may be commenced in the name of a wrong party by mistake of law, and the legislature meant the power of amendment to extend to that case.'"

In *Whitaker v. Pope*, 2 Woods 463, Fed. Cas. No. 17,528, MR. JUSTICE BRADLEY, on the circuit, after judgment, and on a motion in arrest of judgment, ordered the name of the plaintiff, who had no legal or equitable interest in the cause of action, to be stricken out of the record, and the name of the real party in interest to be inserted.

Where an administrator sold a claim due to the estate, and afterwards brought suit thereon in his own name as administrator, the supreme judicial court of Massachusetts held that the purchaser of the claim might be substituted as the plaintiff in the action, although he was not the owner of the claim at the time the suit was instituted by the administrator. *Buckland v. Green*, 133 Mass. 421.

In *McCall v. Lee* (Ill. Sup.), 11 N. E. 522, the suit was originally brought in the name of Thomas McKee as admin-

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istrator of a decedent's estate. In the progress of the case it was determined by the supreme court that Henry R. Lee, and not McKee as administrator, was the proper party to maintain the suit, and thereupon the lower court permitted the declaration to be amended by substituting the name of Lee as plaintiff for that of McKee as administrator. This action of the lower court was assigned as error. The supreme court, in disposing of the assignment, said:

"In *People v. Abbott*, *supra*, this court intimated that the real party in interest in the prosecution of the claim was Henry R. Lee, the appellee herein, and not Thomas McKee, administrator. Accordingly, after the cause was reinstated, the county court, upon application for that purpose, and after due notice, permitted an amendment to be made, substituting the name of appellee as plaintiff in the place of that of McKee, administrator. It is charged that this amendment was improper; that its allowance amounted to the filing of a new claim by a new party, after the two-years limit for the filing of claims had expired; and that, therefore, the circuit court erred in directing the judgment in appellee's favor to be paid out of the assets of the estate, in due course of administration, instead of directing it to be paid out of subsequently discovered or noninventoried assets. In this case the amendment did not make a new cause of action. * * * After the substitution of appellee's name, the claim was still for the same notes and property. April 11, 1881, the day on which it was filed, was within the two years. Where no new cause of action is introduced, courts will allow amendments liberally, for the purpose of avoiding the running of the statute. We think that the amendment was properly allowed on the authority of the following cases: *McDowell v. Town*, 90 Ill. 359; *Insurance Co. v. Mueller*, 77 Ill. 22; *Coal Co. v. Taylor*, 81 Ill. 590; *Challenor v. Niles*, 78 Ill. 78."

In Massachusetts, a suit in equity was brought by a receiver of a corporation, who was not, under the rule which obtains in that state, authorized to maintain it, and the supreme judicial court of Massachusetts held that the bill

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might be amended by substituting for the name of the receiver the name of the corporation of which he was receiver, and cited the following cases: *Buckland v. Green*, 133 Mass. 421; *Costelo v. Crowell*, 134 Mass. 280; *Pierce v. Insurance Co.*, 138 Mass. 151; *Bank v. Stevenson*, 7 Allen 489; *Byers v. Coal Co.*, 106 Mass. 131; *Wilson v. Welch*'(Mass.), 31 N. E. 712.

In *Morford v. Dffenbacker*, 20 N. W. 600, the supreme court of Michigan, CHIEF JUSTICE COOLEY delivering the opinion of the court, said:

"Defendant contends that the court had no power to permit an amendment of the declaration which substituted one party plaintiff for another. This, it is said, made a new suit of it. * * * This contention is plausible, but, we think, not sound.

In *Lottman v. Barnet*, 62 Mo. 159, the supreme court said:

"Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different."

In *George v. Reed*, 101 Mass. 378, the supreme judicial court, speaking by CHIEF JUSTICE CHAPMAN, said:

"The same remark may be made as to the point that the amendment has the effect to repeal the statute of limitations. It is true that, if the amendment had been refused, and the plaintiffs had been compelled to become nonsuit, and commence a new action, the statute of limitations might be a bar to it. But that fact furnishes no argument against the amendment. In *Davenport v. Holland*, 2 Cush. 1, an amendment to a petition for review was granted more than a year after final judgment, when a new petition would have been barred by the statute. The amendment was held to be proper. SHAW, C. J., said that it had often been held to be a good reason for granting amendments on terms, instead of nonsuiting a party, and compelling him to bring a new action, that such action would be barred by the statute of limitations. ♦ He also said that the provisions of law allowing amendments are highly

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remedial, and are construed most liberally to cancel error and mistake and to advance justice and right."

The doctrine of this case is reaffirmed by the same court in *Sanger v. Newton*, 134 Mass. 308, where it is said:

"The fact that the three years within which an original petition could have been filed have elapsed furnishes no ground for refusing the amendment, but rather a reason why it should be allowed, as otherwise substantial justice will be defeated."

In *Van Doren v. Railroad Co.*, 35 C. C. A. 282, 93 Fed. 260, 271, the suit was brought in the name of Laura L. Van Doren, as administratrix of her deceased husband, and subsequently, and after the statute of limitations had run against a suit in her name as widow, she applied to the court for leave to amend the declaration by declaring as widow, instead of administratrix, of her deceased husband. The lower court refused to allow the amendment, but this ruling was reversed by the circuit court of appeals, that court saying:

"Substantial justice requires that such an amendment should be allowed, as a second suit for damages for the death of Henry Van Doren would be barred by the one-year limitation in the Pennsylvania statute."

This court has twice decided that the amendment of a petition has relation to the commencement of the action, and leaves no interval for the statute of limitations to intervene. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448; *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. 202, 16 C. C. A. 498, 36 U. S. App. 81.

Moreover, it is a grave question whether it is competent for the receiver to plead the statute of limitations in a suit upon a claim which was not barred when the comptroller appointed the receiver. The receiver is appointed to collect the assets and pay the debts of the insolvent bank. He is the trustee of the assets of the bank for this purpose. The analogy is very close, if not complete, between a receiver of a national bank appointed by the comptroller of the currency

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under the act of congress, and an assignee in bankruptcy, or an assignee of an insolvent debtor's estate; and it seems to be well settled that such assignees or trustees cannot plead the statute of limitations unless the debt was barred when the trust was created.

In *Ex parte* Ross, 2 Glyn & J. 330, the lord chancellor said :

"The effect of the commission is clearly to vest the property in the assignees for the benefit of the creditors, and therefore they are in fact trustees; and it is an admitted rule that, unless debts are already barred by the statute of limitations when the trust is created, it is not afterwards affected by lapse of time."

In Wood, Lim. Act. § 202, it is said :

"The same rule also applies to insolvent debtors who avail themselves of insolvency statutes, or who are forced into insolvency by their creditors, and the statute is suspended from the time when notice of the proceedings is given in the manner provided by law. So, too, this rule applies when an insolvent debtor makes an assignment under the statute for the benefit of creditors, and it is held in such cases that the statute ceases to run from the date of the assignment."

The case of *Richmond v. Irons*, 121 U. S. 27, 52, 7 Sup. Ct. 788, 30 L. Ed. 864, was a suit in equity by the creditors of an insolvent bank to enforce the personal liability of the stockholders. The defendants pleaded that the creditors' claims were barred by the statute of limitations. Upon that question the supreme court, among other things, said :

"In the case of *In re* General Rolling-Stock Co., L. R. 7 Ch. App. 646, MELLISH, L. J., stated that in a case where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the court of chancery in an administration suit, 'the rule is that every body who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the

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assets, and that the statute of limitations does not run against this claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.' "

And see *Minot v. Thacher*, 7 Metc. (Mass.) 348; *In re Leiman*, 32 Md. 225, 3 Am. Rep. 132, and cases there cited; 46 Cent. Law J. 493, and cases cited. But, as this question was not discussed by counsel, and its determination is not necessary to the decision of the case, we forbear to express any opinion upon it.

There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England to-day the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which

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does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice.

Other errors assigned have been carefully examined, and found to be entirely without merit. As they are of no general importance, a more particular reference to them is unnecessary. The judgment of the circuit court is affirmed.

SANBORN, Circuit Judge (concurring). This action was by the same party and for the same cause from its inception to its close. It was an action in behalf of the state to recover moneys of the state. The treasurer of the state instituted the suit, but, he brought it in his representative capacity in behalf of the state, and not for himself. If he had recovered, the state would have received the benefit of the judgment he obtained. The action might have been maintained by the treasurer in his representative capacity (*McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522), or by the state itself in its own name. In either case the real plaintiff would have been the same. There was, therefore, no change of the real party plaintiff, and hence neither error nor prejudice by the substitution of the state for its representative, the treasurer, and for this reason the judgment should be affirmed.

Studebaker v. Perry

STUDEBAKER

v.

PERRY.

(*Circuit Court of Appeals, Seventh Circuit, June 23, 1900.*)

National Banks—Insolvency—Successive Assessments upon Shareholder—Enforcement.*—The comptroller of the currency has power, under sections 5151, 5234, U. S. Rev. St., to make, and to enforce by action at law, more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay its debts; and the fact that there has been recovered against a stockholder a judgment at law for the amount of an assessment does not preclude the bank's receiver from maintaining against such stockholder a second action to recover a further assessment.

ERROR to the circuit court of the United States for the northern division of the Northern district of Illinois.

Hugh C. Ward, for plaintiff in error.

George W. Wall, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This action was brought by the receiver of the National Bank of Kansas City against the plaintiff in error, Clement Studebaker, to recover the amount of an assessment of \$7 per share upon the capital stock of the bank, of which plaintiff in error is alleged to have held 189 shares. The declaration shows a previous assessment of \$16 per share, which the plaintiff in error had paid. The court overruled a demurrer to the declaration, and, the plaintiff in error refusing to plead further, gave judgment against him.

The only question urged upon our consideration is whether the comptroller of the currency has power, under sections

*See *Aldrich v. Campbell* (C. C. A.), 1 Banking Cases 481.

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5151, 5234, Rev. St., to make, and to enforce by a suit at law, more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The argument for the plaintiff is, in substance, the same as that of JUDGE PHILIPS in *De Weese v. Smith* (C. C.), 97 Fed. 309, where the ruling was that, having recovered against a stockholder a judgment at law for the amount of an assessment, the receiver could not maintain against him a second action to recover a further assessment. The chief grounds of the decision were that the stockholder's liability is upon contract, and cannot be split, and that in making and directing the enforcement of an assessment the comptroller performs a *quasi* judicial function, and by one exercise exhausts the power conferred upon him by the statute. Weight was also given to the statement in the report of the comptroller for 1898 (volume 1, p. 36), "that, for 33 years after the adoption of the national banking act, by all his predecessors in office this statute had received the construction, in practice, that but one assessment was enforceable"; but in the main the conclusion declared was deduced from the opinion of the supreme court in *Kennedy v. Gibson*, 8 Wall. 498-505, 19 L. Ed. 476. The weight of authority and the better reason seem to us to be in favor of the comptroller's right to make successive assessments, as found necessary, which may be enforced in equity or by actions at law, at the option of the receiver. It was conceded at the hearing that an action at law upon an assessment for less than the par value of the stock is maintainable. In *Kennedy v. Gibson* it was said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. * * * This action on his part is indispensable, * * * and must precede the institution of suit by the receiver. * * * The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one.

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Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. * * * When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot, for that reason, be made co-defendants. * * * The receiver is the statutory assignee of the association, and is the proper party to institute all suits. They may be brought, both at law and in equity, in his name, or in the name of the association for his use."

Following this, in an opinion written by the same judge, in *U. S. v. Knox*, 102 U. S. 422, 26 L. Ed. 216, is a distinct recognition of the power of the comptroller to make successive assessments, and it is an anomalous proposition that the power may be affected or cut off at the will of the receiver, by proceeding to collect an assessment by an action at law instead of a suit in equity. Indeed, the contention here is that merely by making one assessment for less than the entire amount of the stock the comptroller deprives himself of the power to make another, and that no more than one assessment can be collected, unless the shareholders shall refuse to pay the first, and the receiver shall choose to proceed in equity to collect it, and so give the court opportunity to hold the case "for further action." See, also, *Bank v. Case*, 131 U. S. Append. cxliv., 28 L. Ed. 961. The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts "to the extent of the amount of their stock therein," and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholder's liability; but the power to enforce does not include a power to

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cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design. In the case of *Aldrich v. Campbell*, 38 C. C. A. 347, 1 Banking Cases 481, 97 Fed. 663, the suit was to enforce a second assessment, the first having been fully paid, and the power of the comptroller to make successive assessments, though not denied, was considered and affirmed. In *Aldrich v. Yates* (C. C.), 95 Fed. 78, the power, though denied, was affirmed by the circuit court for the district of Kentucky, and like rulings in unreported cases have been made at circuit in Indiana and elsewhere.

If the statute were one whose meaning could be sought in contemporary construction, there is nothing in the practice of the comptrollers to affect our conclusion. The comptrollers have had the power to make assessments, either for the entire amount of stock or for less, and the evidence is abundant in the reported cases of the exercise of the power in both ways. Of the effect of proceeding in one way or the other, the question was not, and in the nature of things could not have been, for their decision, and it does not appear that any of them ever assumed to decide it. The judgment is affirmed.

MERENESS

v.

FIRST NAT. BANK OF CHARLES CITY.

(Supreme Court of Iowa, Oct. 4, 1900.)

Certificates of Deposit—Limitations.*—A demand certificate of deposit, in the usual form, is in effect a promissory note, and the statute of limitations commences to run at its date.

Same—Same.—The statute of limitations running against a certificate of deposit is not interrupted by the death of the depositor.

Same—Same.—The fact that the bank writes to the depositor denying liability will not toll the statute of limitations running against his certificate of deposit, where evidence of the bank's liability exists in the bank books.

*See notes at end of case.

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APPEAL by plaintiff from Floyd county district court.
Affirmed.

Springer & Clary, for appellant.

Ellis & Ellis, for appellee.

LADD, J. In the early case of *Bean v. Briggs*, 1 Iowa 488, this court held a time certificate of deposit, in the usual form, negotiable, for that it possessed all the characteristics of a promissory note. Story defines a "promissory note" to be "a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story, Notes § 1. The ordinary certificate of deposit is precisely within this definition, and it is generally held that such certificates are, in effect, promissory notes, and governed, with certain exceptions, by the same rules. *Klauber v. Biggerstaff* (Wis.), 3 N. W. 357; *Bank v. Brown*, 45 Ohio St. 39, 39 Am. St. Rep. 527; *Institution v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; note to *O'Neill v. Bradford*, 42 Am. Dec. 575; 5 Am. & Eng. Enc. Law (2d Ed.) 803, and cases collected. The decisions reaching a contrary conclusion seem to rest on the peculiar wording of particular certificates. See *Patterson v. Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *O'Neill v. Bradford*, *supra*. The exceptions referred to relate to the necessity of a demand before suit may be maintained or the statute of limitations begins to run. The cases so holding seem to rest on the theory that the transaction not alone creates a debt against the drawer of the certificate, but is also in the nature of a bailment,—in contemplation of law a deposit, and not a loan,—and hence that a demand is essential before the holder is entitled to the return of his money. *Payne v. Gardiner*, 29 N. Y. 146 (divided court); *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Brown v. McElroy*, 52 Ind. 404; *Munger v. Bank*, 85 N. Y. 580; *McGough v. Jamison*, 107 Pa. St. 336; *Schute v. Bank*, 136 Mass. 487. The settled doctrine of this court, however, seems to be that, when a

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person deposits money in a bank in the usual course of business, he loans it to the bank, which becomes his debtor to the amount of his deposit, and not his bailee therefor. *Lowry v. Polk Co.*, 51 Iowa 50, 49 N. W. 1049; *Long v. Emsley*, 57 Iowa 11, 10 N. W. 280. See cases collected in 3 Am. & Eng. Enc. Law 826. The title to the money passes to the bank, and becomes subject to its absolute control. The depositor cannot lay claim to the specific money, nor can he maintain an action in replevin or trover therefor. His sole remedy is *assumpsit*. A promissory note payable on demand is due presently, and the statute of limitations begins to run from its date. See note to *Merritt v. Todd*, 80 Am. Dec. 243.

Why a different rule should be applied to a contract held to be an exact equivalent of such a note we are unable to discover. Certificates of deposit in the usual form are no more nor less than promissory notes by the banks issuing them, and, if there is any valid reason for declaring the one due at its date and the other only on demand, this has not been disclosed by the very eminent courts making such a distinction. The reasoning of *Payne v. Gardiner*, 29 N. Y. 146, is quite as persuasive when applied to a demand note. There appears to be no tenable ground for not applying the rule pertaining to promissory notes payable on demand, and holding that the statute of limitations commenced to run at the date of this certificate. *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705; *Mitchell v. Eastern*, 37 Minn. 335, 33 N. W. 910; *Tripp v. Curtenius*, 36 Mich. 494; *Brummagin v. Tallant*, 29 Cal. 504; *Lynch v. Goldsmith*, 64 Ga. 42; *Hunt v. Divine*, 38 Ill. 137. See *First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City (Neb.)*, 15 L. R. A. 386, and note 11 (s. c. 51 N. W. 305).

2. It is the settled doctrine of this state that, where a party against whom a cause of action has accrued in favor of another by actual fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will begin to run from the time the right of

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action is discovered or might have been discovered by the exercise of ordinary diligence. *District Tp. v. French*, 40 Iowa 601; *Findley v. Stewart*, 46 Iowa 655; *Bradford v. McCormick*, 71 Iowa 129, 32 N. W. 93; *Wilder v. Secor*, 72 Iowa 161, 33 N. W. 448; *Carrier v. Railway Co.*, 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799. See note to *Shellenberger v. Ransom* (Neb.), 25 L. R. A. 566 (s. c. 47 N. W. 700). As we have seen, the action accrued at the time the money was deposited, October 12, 1881, and as no fraud against deceased is charged, that statute commenced to run at that time. It was not interrupted by his death. *Grether v. Clark*, 75 Iowa 383, 39 N. W. 655; *Murphy v. Railway*, 80 Iowa

26, 45 N. W. 392. And, generally, the statute
 Same—Same. may not be suspended after beginning to run.

Black v. Ross (Iowa), 81 N. W. 229. There are exceptions to this rule, as when no opportunity is afforded to resort to the courts, as in case of war (*Amy v. Watertown*, 130 U. S. 320, 9 Sup. Ct. 530, 32 L. Ed. 953), or absence from the state (section 345, Code). But we have discovered no case holding that deception by the party liable will toll the

statute. Here what is alleged to have been
 Same—Same. said and written amounted to no more than a denial of liability, and that evidence thereof existed in the books of the bank. The deceased must have known otherwise, and plaintiff acquired the right of action as his representative more than seven years after it had accrued. Surely, under such circumstances, the claim of the reputed debtor, though knowingly false, that he owed nothing, and had no evidence to the contrary, furnished no reason or excuse to the creditor for not instituting suit within the statutory period. Affirmed.

NOTES.

Certificates of Deposit—Statute of Limitations—Demand Necessary.—The statute does not begin to run on a certificate of deposit the amount of which is payable on return of the certificate until

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demand has been actually made. *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, 81 Am. Dec. 603; *McGough v. Jamison*, 107 Pa. St. 336; *Howell v. Adams*, 68 N. Y. 314; *Pardee v. Fish*, 60 N. Y. 265, 19 Am. Rep. 176; *Payne v. Gardiner*, 29 N. Y. 171; *Munger v. Albany City Nat. Bank*, 85 N. Y. 587; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87; *Boughton v. Flint*, 74 N. Y. 476; *Smiley v. Fry*, 100 N. Y. 262.

Or until sufficient time has elapsed to raise the presumption that it is overdue, considering the ordinary conduct of the bank's business. *Auten v. Crahan*, 81 Ill. App. 502.

Where presentation of the certificate properly endorsed was made a condition prerequisite to its payment, special demand was held to be a condition precedent to action thereon. *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377.

In *Lynch v. Goldsmith*, 64 Ga. 42, BLECKLEY, J., said: "What is a certificate of general deposit issued by a bank? Is it not an acknowledgment of the bank that it has received a loan of money from the depositor, coupled with a promise implied, if none be expressed, that it will repay the loan at the bank upon actual demand or call, if no particular time or place be specified? Does not the known course of business require this construction, and does not the nature of the transaction suggest it? If these questions be answered in the affirmative, there is no dishonor of the certificate until after actual demand at the bank, and consequently not until after such demand is the paper overdue."

In *Birch v. Fisher*, 51 Mich. 36, SHERWOOD, J., stated obiter that were the question an open one he would incline to the view that the cause of action on a certificate of deposit did not accrue until demand.

Same—Same—Date of Certificate.—The statute commences to run on a certificate of deposit payable on demand from the date of the certificate, and no special demand is necessary to put in motion *Brummagin v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61; *Tripp v. Curtenius*, 36 Mich. 494; *Mitchell v. Easton*, 37 Minn. 335. See also, *Courthouse & C. H. Com'rs v. Callihan*, 68 Minn. 277; *Bartlett v. Rogers*, 3 Sawy (U. S.) 65; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827; *Hunt v. Divine*, 37 Ill. 137. See *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24.

Same—Same—Effect of Appointment of Receiver.—The fact that a receiver is appointed for the issuing bank does not set the statute in motion. *Riddle v. First Nat. Bank*, 27 Fed. Rep. 503. Compare *Bennett v. Third Nat. Bank (Ill.)*, 3 Bkg. L. J. 289.

Litchfield v. Preston

LITCHFIELD

v.

PRESTON *et al.**(Supreme Court of Appeals of Virginia, Sept. 13, 1900.)*

Real-Estate Liens—Division of Land—Inverse Order of Alienation Rule.—When the purchaser of the first sold part of a tract of land subject to a lien assumes the payment of the lien, such part becomes primarily liable for the whole debt.

Same—Assumption.—No particular form of wards is necessary to create a binding assumption of a real-estate lien.

Same—Same.—When a sufficient part of the purchase money is, by agreement in the deed set apart in the hands of the purchaser to satisfy a lien on the land, it is his duty to see that it is properly applied, although he does not in form assume the payment of the lien.

Same—Same.—Such an agreement inures to the benefit of the subsequent purchaser of the residue of the tract of land.

Banks—Ultra Vires—Acquisition of Land—Collateral Attack.*—Even though the act of a bank in purchasing land was in violation of a statute, because the land was not acquired for the purpose of satisfying a debt previously contracted in the course of the bank's dealings, the only effect of such violation would be to subject the bank to proceedings in behalf of the state to vacate its charter.

APPEAL by defendant from Washington county circuit court. *Reversed.*

Daniel Trigg, for appellant.

J. J. Stuart, White & Penn, and *F. B. Hutton*, for appellees.

HARRISON, J. R. C. Hamilton, being the owner of a tract of land in Washington county, subject to a vendor's lien in favor of his grantor, Mrs. Catherine A. Preston, sold and conveyed by deed of May 22, 1891, an undivided three-fourths part thereof to the appellant, A. T. Litchfield, and others; Litchfield subsequently

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*See note at end of case.

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acquiring from his co-purchasers the whole of said three-fourths.

By deed dated January 2, 1893, R. C. Hamilton sold and conveyed his remaining one-fourth interest in the land to the Exchange & Deposit Bank of Abingdon, and on the 27th day of September, 1894, the bank reconveyed said one-fourth interest to R. C. Hamilton in consideration of \$3,250, reserving a vendor's lien to secure that sum. After these transactions, this suit was brought by Catherine A. Preston to have satisfied her vendor's lien upon the whole tract, amounting, as of March 1, 1897, to \$9,378.67. The entire tract was sold under decree of court, the appellant becoming the purchaser at \$14,116.25. This sale was confirmed, and a commissioner directed to apply, after paying the costs, three-fourths of the proceeds, so far as necessary, to the payment of the vendor's lien due to Catherine A. Preston, and to pay the residue of said three-fourths to the appellant. The commissioner was further directed to apply the proceeds of the remaining one-fourth, after paying costs, to the satisfaction of certain liens against R. C. Hamilton having priority over the vendor's lien in favor of the Exchange & Deposit Bank, and to pay the residue thereof to the bank.

The ground of objection urged by appellant to this decree is that his three-fourths interest in the land is made primarily liable for the payment of the vendor's lien in favor of Mrs. Preston, to the exclusion and release of the remaining one-fourth reserved by Hamilton, and subsequently conveyed to the bank. It is contended that the rule requiring land to be subjected in the inverse order of alienation should govern, and that the proceeds of the one-fourth interest held by Hamilton, being the last sold, should be first applied to the payment of the Preston lien, and the three-fourths interest bought by appellant held secondarily liable for that lien.

At the time that Hamilton conveyed the one-fourth interest to the Exchange & Deposit Bank, his deed to appellant and others, dated May 22, 1891, was duly recorded, and contained

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the following provision with respect to the unpaid purchase money due to Hamilton's grantor: "It is hereby agreed and understood that a sum of said deferred payments equal to the amount of the balance due by R. C. Hamilton to Catherine A. Preston for said tract of land is not to be paid until said balance of purchase money to said Catherine A. Preston is paid, and that the same is to be paid out of said deferred payments."

The general rule is, as stated by appellant, that, when part of a tract of land subject to a lien is conveyed, the residue is primarily liable for the whole debt. An exception to the rule, however, as well established as the rule itself, is that were the purchaser of such part assumes the payment of the outstanding lien, then the part first sold becomes primarily liable for the whole debt. 3 Pom. Eq. Jur. §§ 1206, 1225.

Real-Estate Liens
—Division of and
—Inverse Order of
Alienation Rule.

In the latter section the author says: "Whenever a grantee of any parcel either expressly assumes the payment of the mortgage, or his deed is in such form that he takes the parcel conveyed to himself subject to the mortgage as a part of the consideration, then, as has been already shown, the parcel thus purchased becomes in the hands of himself and of those holding under him primarily chargeable with the mortgage as against the mortgagor or grantor, and consequently as against all subsequent grantees of other parcels from the mortgagor. By such an express or implied assumption, the doctrine of liability in the reverse order of alienation, and all of its consequences, are defeated with respect to the mortgagor and the subsequent grantees."

No particular form of words is necessary to create a binding assumption. It is, however, unnecessary to decide whether or not there was an assumption of the Preston lien by appellant which bound him personally; for if we assume that the agreement in the deed of May 22, 1891, was not such an assumption of the Preston lien as would make the grantees in that deed

Same—Assumption.

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personally liable over and above the funds in their hands going to R. C. Hamilton, the fact remains that the agreement did set apart in the hands of appellant a sufficient amount of the purchase money to satisfy the Preston lien, and it was his duty to see that it was properly applied. Same—Same.

Appellant insists that the agreement in the deed of May 22, 1891, was for his protection only; that it was a mere memorandum between Hamilton and his vendees, with which Mrs. Preston had no concern. This contention is not tenable. It is true the provision in the deed to appellant for the satisfaction of the Preston lien was for his protection, but it also inured to the benefit of the subsequent purchaser of the one-fourth interest. *Willard v. Worsham*, 76 Va. 392; *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871. Same—Same.

The purchaser of the one-fourth interest had a right to rely upon the contract of record between Hamilton and appellant, which showed that the Preston lien was amply provided for. This contract doubtless enabled Hamilton to sell the remaining fourth at its full value. If appellant had complied with his contract, no one could have suffered. Mrs. Preston would have received her purchase money, he would have had his land, and the remaining one-fourth interest would have been relieved. It does not clearly appear that appellant has suffered any loss growing out of these transactions, but, if it did so appear, he could not shift the consequences of his failure to perform a plain duty upon the innocent purchaser of the one-fourth interest, who is in no wise responsible for any loss appellant may have sustained.

Appellant further suggests that the Exchange & Deposit Bank did not buy the one-fourth interest for the purpose of satisfying a debt previously contracted in the course of its dealings, as provided by Code, § 1163, and that, if the land was acquired by the trustees of the bank otherwise than as the law prescribes, they cannot hold it; and, if they have taken it to secure a debt,

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Viros—Acquisi-
tion of Land—Col-
lateral Attack.

Note

then it is subject to the liens against Hamilton, and among them the Preston lien.

This question does not appear to have been raised in the lower court, and there is nothing in the record throwing any light upon the subject. It may fairly be assumed that in purchasing the one-fourth interest the bank was acting within the scope of its powers. But if the bank bought the land outright, and in violation of section 1163, appellant could derive no advantage from that circumstance. The law imposes no forfeiture for its violation, and the only effect of its transgression in the respect mentioned would be to subject the bank to proceedings in behalf of the state to vacate its charter. *Banks v. Poitiaux*, 3 Rand. (Va.) 136.

The decree appealed from is without error, and must be affirmed.

NOTE. This opinion was prepared by JUDGE RIELY at the request of the court. He having died before it was delivered, it is now adopted as the opinion of the court.

NOTE.

Right to Question Corporation's Power to Acquire and Hold Real Estate.—According to the weight of authority, where a corporation, by the law of its creation, is authorized in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, it cannot be made a question by any party, except the state, whether its real estate has been acquired for the authorized uses or not, or is in excess of the capacity of the corporation to take and hold. The state alone must assert her policy in that regard.

United States.—*Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Coie Silver-Min. Co. v. Virginia & Gold Hill Water Co.*, Fed. Cas. No. 2,989; *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co. (C. C.)*, 32 Fed. Rep. 22; *Southern Pac. R. Co. v. Orton (C. C.)*, 32 Fed. Rep. 457; *Runyan v. Coster*, 39 U. S. 122, 10 L. Ed. 382; *Jones v. Habersham*, 107 U. S. 174, Fed. Cas. No. 7,465, 2 Sup. Ct. 336, 27 L. Ed. 401; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188.

California.—*National Water and Mining Co. v. Clarkin*, 14 Cal. 544.

Illinois.—*Alexander v. Tolleston Club*, 110 Ill. 65; *Hamsher v. Hamsher*, 132 Ill. 273, 23 N. E. Rep. 1123, 8 L. R. A. 556.

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Missouri.—Shewalter *v.* Pirner, 55 Mo. 218; Land *v.* Coffman, 50 Mo. 243; Connecticut Mut. Life Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. Rep. 623, 38 Am. St. Rep. 656.

Nebraska.—Watts *v.* Gantt, 42 Neb. 869, 61 N. W. Rep. 104; Missouri Val. Land Co. *v.* Bushneil, 11 Neb. 192, 8 N. W. Rep. 389.

New York.—Bogardus *v.* Trinity Church (N. Y.), 4 Sandf. Ch. 633

North Carolina.—Mallet *v.* Simpson, 94 N. Car. 37, 55 Am. Rep. 595.

Oregon.—Kelly *v.* People's Transp. Co., 3 Or. 189.

Pennsylvania.—Bone *v.* Delaware & H. Canal Co. (Pa.), 5 Atl. Rep. 751; Goundie *v.* Northampton Water Co., 7 Pa. St. 233; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

Texas.—Russell *v.* Texas & P. Ry. Co., 68 Tex. 646, 5 S. W. Rep. 686; Schwab Clothing Co. *v.* Claunch (Tex. Civ. App.), 29 S. W. Rep. 922.

Virginia.—Bank of Virginia *v.* Poitiaux (Va.), 3 Rand. 136, 15 Am. Dec. 706; Fayette Land Co. *v.* Louisville & N. R. Co., 93 Va. 274, 24 S. E. Rep. 1016.

FIDELITY & DEPOSIT CO. OF MARYLAND

v.

COURTNEY.

(*Circuit Court of Appeals, Sixth Circuit, July 13, 1900.*)

Banks—Officers—Indemnity Bonds—Notice of Fraudulent Conduct.—The bond upon which the action was brought was given by the defendant company to indemnify the bank for which plaintiff was receiver against loss by fraudulent acts of M. as its president. The provisions of the bond requiring notice to be given the company only obligated the bank to give notice of the discovery of any default or loss under the bond, and to notify the company when M. engaged in gambling or speculation, or indulged in disreputable or unlawful habits or pursuits. *Held*, that the bank was not required to notify the company that M. was making numerous overdrafts on his personal account in the bank, if it did not know they were made with fraudulent intent; and that the mere fact they were made for fraudulent purposes would not relieve the company from liability under the bond.

Knowledge of Officers as Knowledge of Bank.*—The knowledge

*See note at end of case.

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of an individual director of a bank of misconduct on the part of its president which would amount to such a fraudulent act affecting the duties of the officer as would require notice thereof to the maker of such a bond, in order to be binding on the bank, must be knowledge acquired by the director when engaged in the business of the bank.

Indemnity Bonds—Notice of Fraudulent Conduct—Sufficiency—Question for Jury.—The bond required that the bank should “immediately” give the company notice of the discovery of any default or loss thereunder. *Held*, that the notice given by the bank’s receiver complied with the requirement, if given without a longer delay than the circumstances made necessary; and whether it was so given was a question for the jury in an action on the bond.

Same—Same—Same.—Such notice was general in its character, but it advised the company of the default, claimed the full amount of indemnity, and no objection was taken to it prior to such action. *Held*, that there could be no reasonable objection to the form of the notice.

Same—Proof of Claims.—The proof of claims which was required by such bond was furnished in time, as it was furnished as soon as the full particulars of the claim were developed so as to be capable of proof.

Same—Authority of Cashier to Sign Certificate of Official Conduct.*—The cashier of the bank, without express authority, could not bind the bank by filling in, signing as cashier, and sending to the maker of such bond a certificate of the prior official conduct of the bank’s president, although he had charge of the bank’s correspondence, and the certificate had been received in blank form in a letter from the maker of the bond to the bank requesting the bank to have the certificate filled in, signed, and forwarded.

ERROR by defendant to the circuit court of the United States for the district of Kentucky. *Affirmed.*

This action was brought by the receiver of the German National Bank against the Fidelity & Deposit Company of Maryland to recover upon a bond given to indemnify the

bank against loss by fraudulent acts of J. M. McKnight as president thereof. It appears in the record that on June 1, 1894, McKnight was elected vice president, and executed his bond for one year. Upon June 1, 1895, he was elected president, and the bond was renewed

Case Stated.

*See generally, *note*, 1 Banking Cases 611 *et seq.*

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by him as president, and was again renewed for the further period of one year. The petition sets up various defaults, aggregating \$18,742.74, and prays judgment for the penalty of the bond in the sum of \$10,000. The bond contained, among others, the following provisions: "Whereas, the employee has been appointed in the service of the employer, and has been assigned to the office or position of * * * by the employer, and application has been made to the Fidelity and Deposit Company of Maryland for this bond; and whereas, the said employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed: Now, therefore, in consideration of the payment of the sum of ——— dollars, lawful money of the United States of America, to the company as a premium for the term commencing at the date hereof and ending on the ——— day of ———, eighteen hundred and ninety ———, at 12 o'clock noon, the company does hereby agree that it will, within three months after receipt of proof satisfactory to its directors, and subject to the conditions hereinafter expressed, reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained by any fraudulent act or acts committed by the employee during the continuance of this bond in the performance of the duties of his said office or position, or of such other position as he may be subsequently appointed to or called to fill by the employer in said service, of money, securities, or other personal property belonging to the employer, or for which the employer is responsible. This bond may be continued from year to year, at the option of the employer, at the same or an agreed premium rate, so long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employee occurring between the original date of this bond and the time to which it shall have been continued. This bond is issued and continued upon and subject to the following conditions and provisions: * * * That

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the employer shall immediately give the company notice, in writing, of the discovery of any default or loss hereunder, and shall file with the company his or their claims hereunder with full particulars thereof, as soon as practicable thereafter; and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of this bond, or within six months after the employee shall have ceased to be in the employer's service, shall be payable hereunder. * * * That, upon notification to the company of any loss hereunder, the company's liability shall thereupon terminate as regards any subsequent act of the employee. That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default; and, if the employer shall at any time during the currency of this bond condone any act or default on the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in its service, without written notification to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned. * * * That there shall be a complete inspection of the accounts and books of the employee on behalf of the employer at least once in every twelve months from the date of this bond, such inspection to include examination of all cash and securities of which the employee shall have custody or charge. That the employee has not, within the knowledge of the employer, been at any time in arrears or default either in this or other employment. That the employer shall at once notify the company on becoming aware of the employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits. * * * That the company may, upon giving one month's notice, in writing, to the employer, cancel its responsibility hereunder in so far as it concerns the acts or defaults of the employee subsequent to the end of such month; in which event it will, upon request of the employer, refund the pro-

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portion of the premium paid for the unexpired term of this bond."

The amended answer recites the provisions of the bond, and sets up that neither the bank nor the receiver ever gave notice to the Fidelity & Deposit Company of Maryland of the defaults as required; that the bank did not observe the due and customary supervision over McKnight; that the vice president, who was also a director, knew of the embezzlements of McKnight, yet neither the bank nor the receiver notified the company until long after the bank was closed, in January, 1897; that the receiver did not file his claim against said company until the 18th of February, 1897; that this notice did not give the particulars of McKnight's default, and that defendant did not fully know the same until the 2d of July, 1897; that Rudolph Reutlinger was teller and cashier, and as such had charge of such financial affairs as pertained to said offices; that Adolph Reutlinger was vice president, and was daily in the bank, and thoroughly familiar with all its business affairs, and with the acts and defaults of said McKnight as president; that the directors were also familiar with McKnight's overdrafts; that McKnight's defaults and embezzlements were known to the directors, who allowed them to go on without the knowledge of the Fidelity & Deposit Company; that during the time McKnight was in office the books were out of balance about \$3,000; that the directors and officers allowed McKnight to be constantly overdrawn in his personal account; that his overdraft, January 18, 1896, was \$1,340.14, and on June 8, 1896, it was \$626.23, and that, day in and day out, he was overdrawn, of which fact the directors had knowledge, and these irregular acts and defaults were not known to said defendant, otherwise it would have canceled the bond; that before the renewal of the bond, in 1895-1896, it wrote the bank to ascertain if McKnight had been conducting himself properly, and was informed by the cashier that McKnight had discharged his duties faithfully; that such statements were made with the knowledge of the directors, but that said statements were false

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and fraudulent, which at the time was unknown to said defendant: and that thereby the company was led to renew the bond, which otherwise would have been canceled. And by another amended answer it is charged that McKnight's wrongdoings were known to the directors of the bank when they occurred, or within a few days thereafter, but that said defendant was not notified until long after the bank went into the hands of a receiver. Replication was filed, and the case went to trial, resulting in a verdict for plaintiff. Testimony was offered tending to show various transactions of McKnight's in the course of his business in the bank; among other things, the overdrafts of McKnight, and that checks were given by him, and carried by the cashier as cash items, at the direction of McKnight, for a considerable length of time. There is also testimony tending to show that McKnight, while a candidate for office of mayor in the city of Louisville, which office was to be filled by the council of said city, obtained \$1,000 for one Edmunds, in bills of \$100 each, which money was obtained on Edmunds' check, he, at the time, having no account at the bank as an individual, but Edmunds & Co. had an account there. Edmunds testified he understood the check was to be taken care of by McKnight. It was also testified that a loan was procured of \$2,000 to Britt and Reeder, which money was obtained at the bank after banking hours, and that McKnight said he had a big scheme on hand, and it appeared this money was given for the purpose of obtaining an illegal contract with the councilmen as to possible legislation which might come before them. McKnight, on being asked for an explanation of the matter, claimed that it was all right; that the note was good; that the matter was brought before the board of directors, where McKnight made an explanation to the same effect, and that it seemed to satisfy the board.

E. T. McDermott, for plaintiff in error.

Wm. M. Smith, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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DAY, Circuit Judge, after thus stating the case, delivered the opinion of the court.

1. It is unnecessary to enter into a detailed account of the various defaults, or comment upon the knowledge thereof of the bank directors, as there was a conflict of testimony upon that subject, upon which the court charged the jury as follows :

“There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his in the management of said bank was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee, who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation—sometimes twice a month—of the affairs of said bank, and required the president to go through the same with them, and make a full report thereon; that some of the directors were in the bank almost daily, inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge. As to the \$2,000 Britt and Reeder note, there was also evidence tending to show that R. E. Reutlinger was required to stay at the bank until after bank-

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ing hours, and was directed by McKnight to and did lay out the \$2,000 on said note to said parties, but that further than this he had no knowledge thereof. There was also evidence tending further to show that said R. E. Reutlinger informed his father, Adolph Reutlinger, vice president, of the payment of this \$2,000 that night, and that said Adolph Reutlinger made inquiry of McKnight to explain the transaction; that thereupon McKnight told him that said parties were good and solvent, and the note was regularly discounted, and all right, and that, if required, Gaulbert or Whallen would sign same with them, and that he (McKnight) would guaranty the payment thereof; that the parties were obliged to have the money that night, and he so kept the bank open to let them have it. There was evidence tending further to show that said Adolph Reutlinger then went before the directory, and told them what McKnight had said in regard to this note, and said to them that he had made some investigation, and could not find that these parties had any property; that he was unable to say whether or not they were good, and that thereupon McKnight came before said directory, and made the same statement to them that he had made to Adolph Reutlinger, assuring them that the note was good, and that said directors believed him, and relied on his statement, and so passed the note; that there was no other evidence tending to show any further knowledge of said note, or its true character, by the officers or any of the directors of the bank, than is herein stated, except in the testimony of Jacob Reisch, one of the directors, that some short time after the execution of said note Adolph Reutlinger told him what he had learned thereof as herein stated, and further he says that said Reutlinger told him that the money was used in the mayor's race. This latter statement Adolph Reutlinger denied in his evidence."

Upon the subject of the duty of the bank, under these circumstances, to notify the company of these transactions, that it might end its obligations under the bond, if it saw fit to do so, the court charged the jury:

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“Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that, and consented to it,—there would not have been a fraudulent act by McKnight for which the bank could recover against this company. But if you believe, from the evidence, that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter,—if you believe the bank did not know the fraudulent purposes,—then that changes the result; because, if the bank did not know, and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view the case (you must remember, however, that you are the sole judges of the evidence in this case and its credibility), as I view this case, however, there would be no fraudulent acts upon McKnight’s part (limiting my observations now to the overdrafts), there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it, which was concealed from the bank.”

We think this instruction as favorable as the company was entitled to, and under it, if the jury found that the bank had knowledge that McKnight was doing the acts in question for fraudulent purposes, there could be no recovery upon the bond. We must remember that this obligation was intended to secure the bank against the fraudulent conduct of McKnight in the performance of the duties of his office or position; that McKnight’s action, in order to require notice to the company, must have been “of the discovery of a default or loss under the bond.” While McKnight might have been guilty of reprehensible conduct, it would not require notice unless such as might result in the loss of security or money or personal property of the bank by fraudulent conduct in the performance of his duties to the bank. Such conduct as amounts to

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a default under the bond the employer is bound to report, and if he condones or continues the employee in his service, without written notice to the company, the latter would be discharged from responsibility. Misconduct which would not amount to a fraudulent act affecting the duties of the officer of the bank would not require notice unless it came within that clause of the bond which requires the employer to notify the company when the employee engages in gambling or speculation, or indulges in disreputable or unlawful habits or pursuits. Whether McKnight's conduct was of this character the court left to the jury to determine. They must have found that there was no such misconduct as would avoid the bond while the bank was in operation, and which it was the duty of the bank to report to the company. In this connection it is averred that the court erred in saying that this knowledge must be the knowledge of the bank, intending thereby to exclude the knowledge of individual directors. In the charge above quoted, as to the knowledge of the bank directors, we have already said we find no error. We have carefully examined the record, and find no knowledge brought home to the directors individually, or the cashier in his individual capacity, which was not brought to the attention of the board, which would amount to a default under this bond. Such knowledge, in order to be binding upon the bank, must have been acquired in the course of business of the bank transacted by such officer or director.

Knowledge of
Officer as
Knowledge of
Bank.

It is not necessary to examine the numerous authorities cited upon this proposition. They are well summed up in Boone, Banking, § 132:

"Notice to the directors of a bank when assembled as a board is notice to the bank; nor can any subsequent change of directors require a new notice. * * * And notice to one or more of the directors, when engaged in the business of the bank, will be deemed notice to the bank."

The testimony shows no such knowledge of McKnight's conduct, acquired in the bank's business by individual directors or officers of the bank, and not known to the board, as

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would entitle the company to notice. As was said in *Surety Co. v. Pauly*, 170 U. S. 147, 18 Sup. Ct. 558, 42 L. Ed. 982 :

"It may well be held that the surety company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond."

2. Upon the question of notice of McKnight's default it is strenuously argued that the notice given by the receiver after he took possession of the bank is not such notice as is required, and for that reason there can be no recovery upon the bond. The bank was closed on the 17th of January, 1897. The receiver was appointed on the 22d of January, 1897. On the 18th of February the receiver gave the following notice :

"Louisville, Ky., February 18, 1897.

"To the Fidelity & Deposit Company of Maryland, Baltimore, Md.—Gentlemen: Referring to the certificate No. 4,043, issued from your security department, guarantying the fidelity of Jacob M. McKnight, president of the German National Bank, under your bond to him, No. 5,002, issued June 1, 1894, in favor of such bank, we hereby notify you that said Jacob M. McKnight, as president, has been found in default to this bank, and that you will be required to make indemnity to me as receiver to the extent of said bond.

"Yours truly,

"R. H. Courtney, Receiver German National Bank."

When this notice was offered in evidence, it was objected to, the attorney for the defendant stating:

"We have no doubt he sent it [the notice], and make no point on that, but we desire to object to the admission of it, as not being the notice required in the contract, and therefore we received no notice whatever."

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Exception was taken to the portion of the charge relating thereto on the same ground that the introduction of the notice in testimony was taken, *viz.* that it was not such notice as was required by the contract, and was, therefore, misleading. Neither in this exception, nor when the notice was offered in testimony, was it objected that the notice was not early enough in point of time, but in the assignments of error this averment is added. It may well be doubted if this is not extending the assignment of error beyond the exception taken. Assignments of error cannot broaden an exception, and will not be considered unless called to the attention of the court by proper exceptions. We are of opinion, however, that the court fairly left this question to the jury. It is testified by Mr. Courtney that immediately after the bank passed into his hands as receiver :

"I began to ascertain the defalcations. The experts—Mr. Hays, a government expert, and Mr. Escott, a national bank examiner—were at work immediately after Mr. McKnight's arrest. I kept pace with their investigation. It was almost immediately after the bank closed that these defalcations became known; not all of them, but enough to ground the claim upon. I had that notice of February 18, 1897, mailed to the office at Baltimore. It is my impression that I mailed a like notice to the agent here."

The expert Mr. Escott testifies :

"We began to get these shortages about two or three weeks after the bank was closed. They were discovered from time to time. I began to discover them in two weeks."

If, as Escott says, they began to discover the shortages two or three weeks after the bank was closed, that would mean the discovery was first made between the 2d and 9th of February, 1897. The court left this question to the jury under the following instructions :

"The defendant insists upon this clause of the contract between it and the bank that the 'employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder, and shall file its or their claims

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hereunder, with full particulars thereof as soon as practicable thereafter, and no claim which shall not be so filed by the employer with the company within six months after the expiration or cancellation of its bond, or within six months after the employee shall have ceased to be in the employer's service, shall be payable hereunder.' In considering that clause of the contract between these parties, I do not think the word 'immediately' should be given such construction as that it would mean instantly, but I believe it conforms with the views of the supreme court and the authorities generally to tell you that it means that it was the duty of plaintiff in this case to give, as soon as reasonably practicable, and with promptness, notice of the discovery of any default. It did not mean that as soon as one was suspected that notice should be given; but if you believe, from the evidence, that within a reasonable time after the receiver in this case (and you must remember that he is the receiver merely, and that he knew nothing about the management of the bank, nothing of its affairs, until he was appointed), if you believe that, within a reasonable time after he discovered—actually discovered—a default, he gave the notice of the 18th day of February, 1897, you are at liberty to infer that that part of the obligation of this bond has been performed."

We think there was not such a lapse of time from the time the receiver began to discover these defaults until he gave the notice of February 18, 1897, as would require the question to be taken from the jury. We have already said no notice is required until the bank had knowledge of facts which would justify it in charging dishonesty. In the Pauly Case, *supra*, while it is true the bond says that notice must be given as soon as practicable, instead of immediately, MR. JUSTICE HARLAN says:

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Jury.

"It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the

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expert bookkeepers, made about or a few days before May 23, 1892. The trial court went far enough when it said, in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2d,—the day on which O'Brien left the receiver,—was not as soon as practicable after the receiver acquired knowledge of the facts."

Unless the lapse of time is so long as to be obviously a noncompliance with the contract, the question is one for the jury. In May, Ins. (3d Ed.) § 462, it is said:

"If the notice be required to be 'forthwith,' or 'as soon as possible,' or 'immediately,' it will meet the requirement, if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. To give the word a literal interpretation would, in most cases, strip the insured of all hope of indemnity, and policies of insurance would become practically engines of fraud. Thus, notice within eight days after the fire, and within five days after it came to the knowledge of the insured, has been held to be reasonable. So, where the fire happened on the 10th, and notice of loss, dated the 11th, reached the insurers on the 15th of the same month. But a delay of four months in one case, of thirty-eight days in another, of twenty days in another, and of eleven days in another, there being no sufficient excuse therefor, has been held to be unreasonable. Yet where the insurers had, contrary to their agreement, refused to issue a policy, they were held to have waived their right to object to a notice sent eleven months after the loss. Whether due diligence has been used in giving the notice is a question which is ordinarily left to the jury, to be found from all the circumstances in the case. But, where the facts and circumstances bearing upon the question of due diligence are not in dispute, it becomes a question of law for the court."

In *Donahue v. Insurance Co.*, 56 Vt. 374, notice of a fire was required to be given forthwith. It was held that such notice must be given with due diligence, and within a rea-

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sonable time ; and, although notice was given 22 days after the fire, it was held a question for the jury as to whether it was given forthwith. It was said by the supreme court in the Pauly Case, *supra*, that an indemnity contract is to be construed most favorably to the insured. In speaking of fire insurance policies, under consideration in the Vermont Case, *supra*, the judge said (page 380) :

“The condition that the insured should give the company notice forthwith should be construed liberally in favor of the insured.”

In *Association v. Smith*, 126 Pa. St. 317, 17 Atl. 605, CHIEF JUSTICE PAXSON, in delivering the opinion of the court,—this being a case in which an injury was received by one holding an accident policy on September 4, 1887, notice being given to the company October 19th, the policy requiring immediate notice of the injury,—said :

“The word ‘immediate,’ in the contract, must be construed to mean within a reasonable time thereafter, under all the facts and circumstances of the case ; and what is a reasonable time must be decided by the jury, unless, as before observed, the delay has been so great that the court may rule it as a question of law.”

In *Bennett v. Insurance Co.*, 67 N. Y. 277, speaking of a case where the notice was required to be given forthwith, and it had not been given until 26 days after, JUDGE EARL said :

“The word ‘forthwith’ does not here mean immediately or instantaneously after the fire. It means, and has been held to mean, within a reasonable time or with reasonable diligence after the fire. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468 ; *Inman v. Insurance Co.*, 12 Wend. 452.”

The word “immediately” is certainly no stronger than the word “forthwith,” or the expression “as soon as possible.” In *Insurance Co. v. Flynn*, 98 Pa. St. 628, it was held that 30 days delay will not prevent the submission of the question to a jury in a policy which required proofs to be sub-

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mitted as soon as possible. In *McFarland v. Association*, 124 Mo. 204, 27 S. W. 436, the supreme court of Missouri held:

"Where an accident policy requires 'immediate' notice of the death of the insured to be given, and provides that the same shall be given by letter, notice given within ten days after the death is sufficient. The word 'immediate' will, in such cases, be construed to mean, within a reasonable time.' "

See, also, *Insurance Co. v. Lippold*, 3 Neb. 391; *Harnden v. Insurance Co.*, 164 Mass. 382, 41 N. E. 658; *Insurance Co. v. Scammon*, 100 Ill. 645.

Assuming that the defalcations were becoming apparent to the experts so that they began to discover them two or three weeks after the bank was closed, we cannot say, as a question of law, that such facts had been discovered as would justify a prudent man in charging another with dishonesty so as to require notice, and we think the question was properly left to the jury under the instructions given. Some cases have been cited in which it seems a more restricted view of this requirement is taken, but we think the opinion here expressed is more consonant with the intention of the parties and the purposes of indemnity contracts. In *Bouv. Law Dict.* it is said of the word "immediate":

"Strictly it implies not deferred by any lapse of time, but as usually employed it is rather within reasonable time, having due regard to the nature and circumstances of the case."

3. Nor do we think there is any reasonable objection to the form of the notice given. The purpose of the notice was to enable the indemnity company to terminate its liability, and to obtain such remedies as it might see fit to adopt against the defaulter. The notice sent was general in its character. It advised the company of the default, claimed the full amount of indemnity, and no objection was taken to it.

4. It was further objected at the trial that the proof of claims, which was required by the bond to be made out as soon as

Same—Same
Same.

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practicable after the default, was not furnished in time. This claim was filed in July, 1897. During all that time the investigation was going on, and the books of the bank were being examined. So far as the testimony discloses, the full particulars of the claim were not developed until July so as to be capable of proof.

Same—Proof
of Claims.

5. It is claimed the court erred in excluding a certain letter signed by Reutlinger, cashier, concerning McKnight's performance of his duties as president. The president of the Fidelity & Deposit Company, on the 15th of May, 1896, wrote the bank as follows :

Same—Authority
of Cashier to Sign
Certificate of Offi-
cial Conduct.

"Baltimore, Md., May 15, 1896.

"To German National Bank, Louisville, Ky.—Dear sir: We hereby notify you that bond No. 5,002 for \$10,000, issued by this company on behalf of Jacob M. McKnight, in your employ as president, will expire on the 1st day of June next. The premium, forty dollars, should be paid on or before the date of expiration, otherwise the bond will lapse. Kindly have the certificate below filled in and signed, and forward with remittance for premium to Jos. O. Odiorne, general agent. when the renewal receipt will be sent to you.

"Yours, respectfully, Edwin Warfield, President."

The certificate referred to was filled in by the cashier, having been inclosed in blank form in the letter from the company, and was returned, of date May 29, 1896, to the fidelity company, and is in the following language :

"The Fidelity & Deposit Company of Maryland: This is to certify that on the —— day of ——, 189—, the books and accounts of Mr. J. M. McKnight, is president, in our employ, as has no books and accounts were examined by us, and we found them correct in every respect, and all moneys handled by him accounted for. He has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued.

Note

His salary is now \$4,500, and he is employed as president.

"Signature: R. E. Reutlinger, Cashier, Employer.

"Dated at Louisville, Ky., May 29, 1896."

This certificate, signed by the cashier, was excluded, because there was no showing that there had been special authority from the board of directors authorizing or directing the cashier to fill out and send it. It is earnestly argued that the cashier, by virtue of his office, and having charge of the correspondence of the bank, had full authority to answer this communication in the way which he did; and, being in the apparent scope of his authority, the bank is bound by it. A majority of the court are of opinion that the case is ruled by *Surety Co. v. Pauly*, *supra*, in which the president wrote a similar letter for the cashier, and it was held that the president of the bank, in the absence of express authority, could not bind the bank. There is no showing that the bank authorized the cashier to fill out the certificate and return it. It is not a case of answering a usual letter of the bank in the course of its business. A certificate as to the prior conduct of McKnight was inclosed, and an answer required. Nothing is shown in this case showing express authority, and we do not think such inheres in the duties of the office of cashier without special authority.

Other errors are assigned, which either fall within the principles already laid down, or are not of sufficient weight to require further attention. Finding no error in the record of the proceedings in the court below, the judgment is affirmed.

NOTE.

Knowledge of Officer—Notice to Corporation.—In order for the knowledge of an officer to be notice binding upon his corporation, it must be knowledge coming to him while he is concerned for the corporation, and in the course of the very transaction which is the subject of the suit, or so near before it that he must be presumed to recollect it. *Conger v. Chicago, etc., R. Co.*, 24 Wis. 157, 1 Am. Rep. 164. See *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 399; *Farrell Foundry v. Dart*,

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26 Conn. 376; Winchester v. Baltimore, etc., R. Co., 4 Md. 231; Miller v. Illinois Cent. R. Co., 24 Barb. (N. Y.) 312; Smith v. South Royalton Bank, 32 Vt. 341; Holt's Case, 22 Breeve 48; Bank of U. S. v. Davis, 2 Hill (N. Y.) 452; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Farmers' & Citizens' Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Custer v. Tompkins County Bank, 9 Pa. St. 27.

In Campbell v. Denver First Nat. Bank (Colo.), 43 Pac. Rep. 1007, it was held that a corporation is chargeable with information acquired by its agent in the course of his own private business, provided such knowledge is retained by him at the time of the transaction in question. Compare Kearney Bank v. Froman, (Mo.), 31 S. W. Rep. 769.

In order to charge a corporation vendee of real estate with knowledge of outstanding equities therein, on the sole ground that its managing officer had such knowledge, it is not sufficient to show simply that such officer obtained such knowledge more than three years before the organization of such corporation. It must at least further appear that such knowledge was present in the mind of such officer at the time of the transaction in which the corporation is sought to be charged. Red River Valley L. & I. Co. v. Smith (N. Dak.), 8 Am. & Eng. Corp. Cas., N. S., 83.

STATE

v.

CADWALLADER.

(*Supreme Court of Indiana, May 29, 1900.*)

Appeal—Review—Sufficiency of Record.—The contention that the bill of exceptions was not properly in the record was without merit.

Receiving Deposits after Insolvency—Proof Required—Indebtedness to Bank Officers—Statute.—In a prosecution based upon section 2031, Burns' Rev. St. 1894 of Indiana, providing for the punishment of bank officers for fraudulently receiving a deposit after the bank's insolvency, the state is not required to prove that the depositor was not indebted to any of the bank's officers.

Same—Knowledge of Insolvency—Pleading and Proof.*—In such a proceeding, defendant's knowledge of the bank's insolvency need not be alleged nor proved in order to secure a conviction; but the absence of such knowledge may be shown as a matter of defense.

*See note at end of case.

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Same—Officer's Knowledge—Presumptions—Effect of Negligent Ignorance.—In such a proceeding against one who was the president and director of a bank, where it appears that he, by the exercise of reasonable diligence, could have discovered the bank's insolvency before the deposit in question was received, the presumption arises that he had knowledge of the bank's condition. And, though this presumption may be rebutted, defendant cannot avail himself of his own negligence or carelessness as an excuse for his want of knowledge of the bank's insolvency.

Same—Presumption of Knowledge—Instructions.—A trial court, in charging a jury in respect to such presumption of knowledge on the part of the defendant bank officer, should not go further than to direct the attention of the jury to their right to draw the inference; and it is not proper for the court to attach weight or value to such presumption, as that is the exclusive province of the jury.

APPEAL by the State from Randolph county circuit court.
Appeal sustained.

C. L. Hutchins, Pros. Atty., Thos. Hutchins, John W. Ryan, Wm. A. Thompson, and W. A. Ketcham, Atty. Gen., for the State.

Enos L. Watson, James A. Engle, John J. Cheney, and Theodore A. Lockney, for appellee.

JORDAN, J. The appellee was charged by indictment with having violated the statute defining the crime of embezzlement by bankers and brokers. A trial by jury resulted in his acquittal, and this appeal is prosecuted by the state upon the questions of law reserved by it relative to certain instructions given to the jury by the lower court on its own motion. The evidence is not in the record. Therefore, if the instructions of which the state complains can be said to be proper, upon any supposable evidence which might have been introduced upon the trial, under the issues in the case, this appeal cannot be sustained.

It is first insisted by the appellee that the bill of exceptions embracing the instructions given by the court is not properly in the record. An examination of the transcript discloses that the verdict of the jury was returned on the 18th day of November, 1897; the same being the 16th judicial day of the November term, 1897, of the Randolph circuit court. A judgment thereon discharg-

Case Stated.

Appeal—Review—Sufficiency of Record.

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ing the defendant was rendered on the same day. The following entry appears in the proceedings: "And afterwards, to wit, on the 7th day of December, 1897, the same being the 32d judicial day of the November term, 1897, the following bill of exceptions was filed by the prosecuting attorney in the office of the clerk of the Randolph circuit court." Immediately following this entry appears the bill of exceptions, containing all of the instructions given in the cause. The reason assigned by counsel for appellee that the bill in question is not in the record is that it does not appear that it was filed in the office of the clerk of the lower court. This insistence is in no manner supported by the record, but, upon the contrary, it is affirmatively disclosed that the bill was signed by the trial judge, and filed by the state in the office of the clerk, during the term in which the cause was tried. Consequently, under the circumstances, there can be no question but what the bill is properly a part of the record.

The indictment in this case, among other things, charges that appellee was on the 2d day of May, 1896, president of an incorporated banking company, by the name and style of the Citizens' Bank, situated in Randolph county, Ind., and doing a banking business therein; that appellee on the said 2d day of May, as such president, at the said county and state, unlawfully, feloniously, and fraudulently received from one Charles Shultz the sum of \$60 as a deposit in said bank, said bank at the time being then and there insolvent, which fact of insolvency was then and there well known to the appellee; and that by reason of said insolvency the money so deposited was lost to the said Shultz, etc. Section 2031, Burns' Rev. St. 1894, upon which this prosecution is based, is as follows: "If any banker, or broker, or person or persons doing a banking business, or any officer of any banking company, or incorporated bank doing business in this state, shall fraudulently receive from any person or persons, firm, company or corporation, or from any agent thereof, not indebted to said banker, broker, banking company or incorporated bank, any money, check, draft, bill of exchange, stocks,

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bonds, or other valuable thing which is transferable by delivery, when, at the time of receiving such deposit, said banker, broker, banking company or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker, or officer, so receiving such deposit, shall be deemed guilty [of] embezzlement, and upon conviction thereof, shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto may be imprisoned in the state prison not less than one nor more than three years. The failure, suspension or involuntary liquidation of banker, broker, banking company or incorporated bank, within thirty days from and after the time of receiving such deposit, shall be *prima facie* evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." The court's charge to the jury embraces 42 separate instructions. In respect to these the state addresses its objections and criticisms more especially to Nos. 6, 13, 18, and 21. By the sixth charge the court enumerated and stated to the jury what essential facts the state was required to establish in order to justify a conviction of the accused. Among the facts enumerated by this charge as necessary to be proven by the state in order to convict the defendant are: First, that at the time the deposit in question was made the bank in controversy was insolvent; second, that at that time the depositor was not indebted to said bank; third, that he was not indebted to any of the bank's officers; fourth, that the defendant knew that the bank was insolvent. The charge closed with the statement that a failure by the state to establish any one of these facts beyond a reasonable doubt would require the acquittal of the defendant. The first proposition is a correct statement of the law. The second may also be approved, with the exception that the jury ought to have been advised that the indebtedness of the depositor contemplated by the statute in question must be upon a claim or demand held by the bank against such depositor, and due from him at the time of the deposit, and equal to or in excess of the amount

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deposited. State v. Beach, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179. The insolvency of the bank, and the absence of indebtedness to it upon the part of the depositor, as stated, were both, under the statute above set out, essential elements of the alleged offense for which the defendant was prosecuted in this action. Upon no view of the case, however, can the third and fourth propositions embraced in the charge in controversy be sustained. While it is true that it was incumbent upon the state, as heretofore said, in order to establish the guilt of the accused, to prove that at the time of the deposit the depositor was not indebted to the bank upon a matured claim or demand to an amount equal to or in excess of the deposit, still the state was not required to go beyond this, and also prove that such depositor was not indebted to any of the bank's officers. The trial court by this statement to the jury injected into the case a fact not legitimately at issue therein, and one upon which the successful prosecution of the defendant in no manner depended. In respect to the fourth proposition, it may be said that the statute upon which this prosecution rests is silent in regard to the knowledge of the accused party of the insolvency of the bank at the time the deposit is received; and such knowledge cannot be said to be such an essential fact of the offense as would require of the state to allege it in its pleadings, and prove the same upon the trial, in order to secure a conviction. The absence of such knowledge, however, may be shown by the accused upon the trial, as a matter of defense, to justify his act in receiving the deposit when the bank was insolvent. Therefore, if, upon a consideration of all of the evidence given in a case upon a prosecution under the statute in dispute, it should appear that the accused party had no knowledge of the bank's insolvency at the time the deposit was made, or if a consideration of the evidence and all the legitimate inferences arising therefrom creates in the minds of the jury trying the cause a reasonable doubt as to the defendant's knowledge of such fact, then, in

Receiving Deposits after Insolvency—Proof Required—Indebtedness to Bank Officers—Statute.

Same—Knowledge of Insolvency—Pleading and Proof.

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either event, he should be acquitted. If in fact, however, the one accused of the crime defined by this statute is really ignorant of the insolvent condition of the bank at the time the deposit is received, and such ignorance upon his part is not superinduced by his own fault or negligence, he may upon his trial avail himself of such want of knowledge as a defense to relieve him of any evil intent to defraud, and thereby be absolved from criminal liability. *Squire v. State*, 46 Ind. 459; *Payne v. State*, 74 Ind. 203; 1 Bish. New Cr. Law, § 303.

By instruction 13 the jury was informed that the president of the bank is presumed to know, and that it is his duty to know, whether or not his bank is solvent, and he is presumed to know all that the books of the bank disclose in regard to its liabilities, their character and amount, and the date of their maturity, the assets of the bank, their extent, character, and value, and their availability to meet and pay the bank's liabilities as they may be presented to it in the ordinary course of its business. The instruction closes with the following statement: "This, however, is not a conclusive presumption. If, as a matter of fact, from negligence or any other reason, he does not know that it is insolvent, he cannot be criminally responsible for such negligence." The state assails (and properly, so we think) this part of the charge which excuses the lack of knowledge of the insolvent condition of the bank upon the part of the defendant when it appears that his ignorance of such insolvency is due to his own negligence or fault. By this latter instruction the court, after stating to the jury, in effect, at least, that the defendant, as the president of the bank in controversy, was presumed to know whether or not it was solvent, and that it was his duty to know such fact, broadly advises them that if by reason of the defendant's negligence, or any other reason, he does not know that the bank is insolvent, he is not criminally responsible under such circumstances. The statute under which the defendant's bank is alleged to have been organized provides that the directory shall elect one of their

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number president of the bank, and, as the defendant herein was the president of the bank, it may be assumed that he was also one of its directors. The very object or purpose of the statute is to prevent bankers, brokers, and bank officials, by subjecting them to a criminal prosecution, from receiving deposits when their bank is insolvent. It is certainly evident that the solvency or insolvency of a banking institution is a matter which may be said to be peculiarly within the knowledge of its directors and its other managing officers, and it may therefore be presumed that its directory and such other managing officials, so long as they continue to operate the bank, know whether it is solvent or insolvent. Depositors, as a rule, have no means of accurately ascertaining the true financial condition of a bank, and they must necessarily act upon the presumption that the directors and the other officers thereof are not violating the law by keeping the bank open and receiving deposits when it is insolvent. It is the imperative duty of such officers, when they receive deposits

from the bank's patrons, to know that the bank is solvent, if, under the circumstances, by the exercise of reasonable diligence such fact could have been ascertained. If, by the exercise of such diligence in making an examination and inquiry in respect to the solvency or insolvency of the bank, its true condition could have been discovered, then, under such circumstances, the presumption will be that they had knowledge of the bank's condition at the time the particular deposit was received. When tested by the rule which we assert, it must be held that the defendant in this case, under the facts, was charged with duty of knowing the condition of his bank at the time he received the deposit in question; and, if at that time it was insolvent, the inference or presumption would arise that he, as such director or president, had knowledge of such insolvency. While it is true that the defendant upon the trial would be entitled to rebut or overthrow this adverse presumption, still

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Presumptions—
Effect of Negligent Ignorance.

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he would not be permitted to avail himself of his own negligence or carelessness as an excuse for want of knowledge in regard to the insolvency of the bank. Of course, if the accused person is ignorant of the insolvent condition of the bank, because sufficient time and opportunity have not been afforded him to discover its true condition before receiving the deposit, a different question will be presented. If the party charged with a violation of the statute in question could be permitted to shield himself behind his own negligence or carelessness, and thereby excuse his want of knowledge of the bank's insolvency at the time the deposit was received, then the statute which was designed to furnish protection to depositors would be of no avail in securing such protection. In the case of *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, the supreme court of that state, in a prosecution under a statute which is substantially the same as that upon which this prosecution is based, said: "If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows at the time of receiving such deposit whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent; and it is criminal negligence for him not to know of his own insolvency." It cannot be presumed that it was the intention of the legislature, in the enactment of the statute in controversy, to inflict a penalty upon a banker or bank official for receiving a deposit, when at the time of receiving the same he was actually ignorant of the bank's insolvency, by reason of his not being afforded sufficient time and opportunity to discover the fact before receiving the deposit. See *State v. Beach*, 147 Ind. 74, 83, 46 N. E. 145, 36 L. R. A. 179. It may be asserted that when it appears that the person accused of violating the statute in question is shown to have exercised due diligence, under the circumstances, to

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acquaint himself with the condition of the bank, but nevertheless at the time of receiving the deposit he, considering all of the circumstances, had good reasons to believe, and did honestly believe, that the bank was solvent, then, under such circumstances, he will be absolved from criminal liability. *Squire v. State*, 46 Ind. 459; *Goetz v. State*, 41 Ind. 162; *Ward v. State*, 48 Ind. 289; *Payne v. State*, 74 Ind. 203. The rule which obtains under such circumstances is well stated by an eminent author as follows: "The wrongful intent being the essence of every crime, it necessarily follows that whenever one without fault or carelessness is misled concerning facts, and thereon acts as he would be justified in doing were they what he believes them to be, he is legally innocent, the same as he is innocent morally. The rule in morals is stated by Wayland to be that if a man 'know not the relations in which he stands to others, and have not the means of knowing them, he is guiltless. If he knew them, or have the means of knowing them, and have not improved these means, he is guilty.' The legal rule is neatly enunciated by BARON PARKE thus: 'The guilt of the accused must depend on the circumstances as they appear to him.' " 1 Bish. New Cr. Law, § 303, subd. 3; *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

By charge 18 the court instructed the jury that if they believed from the evidence, beyond a reasonable doubt, that the defendant had been a director and president of the bank in controversy continuously for three years prior to the day upon which he received the deposit in question, and that during all of said time he was in the active management and control of the business of the bank, and if they further believed from the evidence that the bank on that day was insolvent, then the presumption would be that the defendant knew of its insolvent condition, but that such presumption would not be conclusive, and that it might be shown, as a matter of fact, that the defendant did not know that the bank was insolvent. The objection urged by the state to this charge is that the

Same—Presumption of Knowledge—Instructions.

Note

court erred in advising the jury that the presumption, under the facts stated, in respect to the defendant's knowledge of the insolvency of the bank, was not conclusive, but might be rebutted. The charge cannot be held to be erroneous upon this ground, for the defendant certainly had the right to overcome such adverse presumption by showing by legitimate evidence that in fact he, without his own negligence or fault, was ignorant of the true condition of the bank at the time the deposit was received. It may be said, however, in this connection, that a trial court, in charging a jury in respect to the presumption of a fact, should not go further than to direct the attention of the jury to their right to draw the inference. It is not proper for the court to attach weight or value to such inference or inferences, as that is the exclusive province of the jury. *Smith v. State*, 58 Ind. 340. By reason of the errors pointed out in the charge of the court, we are compelled to sustain this appeal at the cost of the appellee. Appeal sustained.

MONKS, J., did not participate in the decision of this appeal.

NOTE.

Officers—Liability for Receiving Deposits after Insolvency—Knowledge.—See *State v. Darragh* (Mo.), 2 Banking Cas. 257; *Utley v. Hill* (Mo.), 2 *Id.* 371, and *note*, p. 408; *James Clark Co. v. Colton* (Md.), 2 *Id.* 530.

Knowledge on the part of the directors of the bank's insolvency will be conclusively presumed, and need not be alleged in an action against them for fraud and deceit. *Tate v. Bates*, 118 N. Car. 287.

The burden of proving want of knowledge is on the officer sued. *Dodge v. Mastin*, 17 Fed. Rep. 660.

In *Murphy v. People*, 19 Ill. App. 125, it was held that knowledge of insolvency and a fraudulent intent need not be pleaded nor proven, the Ill. Act of 1897 making the receiving of a deposit and losing it by insolvency a criminal offense, not making such knowledge and intent elements of the offense.

Where a bank's insolvency at the time a deposit was received is not denied and the bank failed within three days after such deposit, it was held that a *prima facie* case of knowledge was made out, under

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the provisions of § 222, Mills' Colo. Ann. St., which makes a failure within thirty days after receiving a deposit *prima facie* evidence of knowledge. McClure v. People (Colo.), 61 Pac. Rep. 612, 2 Banking Cas. p.—, *post*.

The constitutionality of such statutes has been upheld in Robertson v. People, 20 Colo. 279; State v. Buck, 120 Mo. 479; State v. Beach, 147 Ind. 74; Meadowcroft v. People, 163 Ill. 56; American T. & S. Bank v. Gueder, 150 Ill. 336. See also, Baker v. State, 54 Wis. 368.

Officers of a bank are charged with knowledge of its financial condition. Eads v. Orcutt, 79 Mo. App. 511.

CASSIDY

v.

UHLMANN.

(Court of Appeals of New York, June 12, 1900.)

Receiving Deposits with Knowledge of Insolvency—Evidence—Defendant's Belief.*—In an action against a bank director to recover deposits received after the bank's insolvency, where defendant's liability is predicated upon the claim that he fraudulently suppressed his knowledge of such insolvency, defendant's testimony as to his belief in regard to the condition of the bank is competent evidence, and entitled to be weighed by the jury with the other evidence in determining what was his intent.

APPEAL, by a defendant from First department appellate division supreme court. *Reversed*.

William A. Jenner, for appellant.

Harold Nathan, for respondent.

PARKER, C. J. Plaintiff's assignors were depositors of the Madison Square Bank, which was closed on the 9th day of August, 1893, by the bank examiner. They made the deposits involved in this action on the 7th and 8th days of August, at which time the bank was hopelessly insolvent, and this action is brought to recover the amount of such deposits from the president and two of the directors of the bank, one of whom was the defendant Uhlmann. The complaint was

*See State v. Cadwallader (Ind.), *ante*, p. 651, and *note*, p. 660.

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framed and the action tried upon the theory that this defendant was guilty of a fraud by which the plaintiff's assignors were damaged, in that, with actual knowledge of the bank's insolvent condition, he, together with the president and another director by the name of McDonald, was instrumental in keeping the bank open and receiving deposits of all who came to it, including plaintiff's assignors. The claim was not that there was direct, open misrepresentation by the defendant, but rather that his fraud consisted in a suppression of the truth as to the insolvent condition of the bank, and at the same time participation in the direction, which kept the bank open for the receipt of deposits after he was possessed with full knowledge of its insolvency. His liability, therefore, was predicated solely upon fraud, and the plaintiff attempted to show the entire history of the financial condition of the bank from immediately previous to the 7th day of August, 1893, down to and including the time when it came into the possession of the bank examiner; and he claimed that the facts proved required a finding by the jury that the defendant Uhlmann had knowledge of the real condition of the bank on the 7th and 8th of August. The contention of the defendant was that the result of an examination made by him showed that the bank had more than sufficient property to pay its depositors in full, and he marshaled such facts and circumstances as he could to support his contention that he was acting in good faith, and without knowledge of the insolvency of the bank. This was one of the issues, indeed the leading one, and the defendant sought to put before the jury his belief, touching the responsibility of the bank up to Tuesday night, August 8th, his claim being that his belief constituted an important element, which the jury should weigh. The following question was asked: "Q. Now, Mr. Uhlmann, what was your belief up to Tuesday night with regard to the surplus that the bank had for the purpose of paying its liabilities? (Same objection. Objection sustained. Defendant excepts.) Q. From whom did you receive information with regard to the condition of the bank up to Tuesday

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night? A. From Mr. Blaut, the president; Mr. Thompson, the cashier; from Mr. McDonald, a director; from inquiry in the books of the commercial agency; and from inquiry at banking houses as to the value of securities. Q. Now, as a result of that information, what was your belief as to the financial condition of the bank up to Tuesday evening? (Objected to. Objection sustained, and exception.)” Evidence was also given on the part of the defendant tending to show that the defendant advised that deposits on the 7th and 8th of August should not be mingled with the funds of the bank, owing to some suspicious circumstances that made an investigation of the bank’s affairs necessary, but that the moneys of depositors should be kept by themselves until an investigation should disclose the real condition of the bank. It seems to be pretty conclusively established that such a conversation took place, and that for some part of Monday, the 7th, that course was taken with the moneys received from depositors. Some time after noon of that day, however, the president, having had a talk with the head of the force of bank examiners, said that he proposed to telephone to the cashier to take the deposits according to the usual course of business, and to that course this defendant testifies he protested in vigorous language. That course was adopted, however, but under such circumstances as leads plaintiff to insist that such deposits were thereafter taken with knowledge on the part of this defendant that deposits were being received. Still the defendant insisted, under oath, that he did not know it, and the court was asked to permit him to declare on oath his belief on that subject for the consideration of the jury. “Q. What was your belief as to the taking of deposits on Monday, up to the meeting of the bank Monday evening? (Objected to as incompetent, immaterial, and irrelevant, and calling for the mental operation of the witness. Objection sustained. Defendant excepts.) Q. Did you believe on Monday, up to your visit to the bank Monday evening, that the instruction which Mr. Putney or Mr. McDonald had given on Saturday evening with respect to taking deposits

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was being carried out? (Same objection. Same ruling. Defendant excepts.) Q. Did you have any belief that depositions were being taken on Monday, up to Monday evening? (Same objection. Same ruling. Defendant excepts.)” It is, of course, the general rule that the operation of the mind of a witness may not be given; but there are exceptions to the rule, and among them is a case where the character of the act depends on the intent with which the act is done, or, in other words, upon the operation of the doer’s mind, and in such case his belief touching certain conditions which should influence him is material. A party’s testimony as to his belief may have much or little value with the jury, but he is always entitled to have it considered, where, as in this case, his liability is predicated upon the claim that with knowledge of the truth he suppressed it under circumstances calling upon him to speak, with the result of injury to another. If it were a fact that, after having made such an investigation of the affairs of the bank as a reasonable and prudent man would make under the circumstances with which he was surrounded, he believed, as a result thereof, that the bank was solvent, then the action should not have gone against him, for he acted justly and properly, according to his belief, and therefore not fraudulently. But the plaintiff says that there was abundant evidence from which the jury could find that his knowledge was such that he could not, and did not, entertain any such belief. That may well be so, but the fact remains that his belief was a fact of the first importance in the case, and he was entitled to testify as to what it was, not because his testimony would be controlling, for it would not, but because he was entitled to have it weighed by the jury with the other testimony in determining what the fact was. The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. GRAY and VANN, JJ., dissent.

Judgment reversed, etc.

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NATIONAL BANK OF BALTIMORE

v.

MAYOR, ETC., OF BALTIMORE *et al.*

(*Circuit Court of Appeals, Fourth Circuit, February 24, 1900.*)

State Taxation of National Banks—Discrimination—Construction of Federal Statute.*—It is equality of assessment with other moneyed capital that is sought to be obtained by section 5219 of the U. S. Rev. St., providing that national bank shares shall not be taxed at "a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," and not equality with personal property generally. And railroad companies, manufacturing or mining companies, and the various commercial enterprises in which capital is employed, are not within the contemplation of such provision.

Same—Same—Same—"Moneyed Capital."—Wherever money is employed in the carrying on of a business, the object of which is the making of profit by its use as money, it is moneyed capital within the meaning of such section of the federal statute. So, when such capital is invested in loans or securities of a permanent or temporary character, if it is so invested with a view to sale and reinvestment for the purpose of making money by the operation, it is moneyed capital within the meaning of such section, but the securities themselves do not necessarily come within the definition.

Same—Same—Same—Shares in Foreign Corporations.—A statute of Maryland provided, in substance, that all bonds, certificates of indebtedness, or evidences of debt, and all shares of stock in any bank or other corporation incorporated by any other state, owned by residents of Maryland, should be valued and assessed at their actual value in the market, and that no more than 30 cents on each \$100 of valuation thereof should be paid for state, county, and municipal taxation, while the shares of the national banks in the city of Baltimore were taxed for municipal purposes at the rate of \$2 upon every \$100 of valuation. *Held*, that the contention that such statute was in violation of the restriction in section 5219 of the U. S. Rev. St. because it tended to create competition injurious to such national banks, by causing corporations and companies outside of the state

*See notes at end of case.

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to send large sums of money to Baltimore to be loaned, was without merit.

Same—Same—Same—Same.—The contention that such statute enabled the private bankers in Baltimore, by investing their capital in the bonds, certificates of indebtedness, and evidences of debt described in subdivision 1 of section 201 of the Maryland statute, to compete unfairly with the national banks of the city was not sustained by the record; and, therefore, was without merit.

APPEAL by complainant from the circuit court of the United States for the district of Maryland. *Affirmed.*

Bernard Carter and George R. Gaither, Jr. (Willis & Homer, on the brief), for appellant.

John V. L. Findlay and Leon E. Greenbaum, for appellees.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

BRAWLEY, District Judge. The National Bank of Baltimore filed its bill in the circuit court of the United States for the district of Maryland, complaining that certain legislation of the state of Maryland, relating to the valuation and assessment for taxation of certain classes of personal property, was obnoxious to the provisions of section 5219 of the Revised Statutes of the United States, and, having tendered the amount which it claimed was all that was justly due, injunction was prayed to restrain the mayor and city council of Baltimore and its tax collector from collecting the amount charged against it in unfair discrimination. The injunction was refused, the bill dismissed, and the case is here on appeal. (C. C.) 92 Fed. 239.

By the laws of Maryland, all the shares in national banks in the city of Baltimore are, for the purposes of state, county, and municipal taxation, required to be assessed and valued at their actual cash value. The bank makes its return annually to the tax commissioner, reporting, among other things, the prices at which any sales of its stock have been made during the year; and after deducting from its list of securities any which by law are exempt from taxation, and its real estate, which is separately taxed, the actual market

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value of the whole of the capital stock, less such deductions, is charged against the bank, which pays for all of its resident shareholders at such a rate of taxation as is fixed each year for city purposes by the mayor and city council of Baltimore. Such rate for the year 1897 was \$2 on every \$100 of the assessed value of all property within the city limits, except in certain territory annexed since 1888, wherein, by virtue of the act of assembly of that year, the rate of taxation was fixed at not exceeding 60 cents on every \$100 of taxable property for a term of years, which expires in 1900. The shares of the complainant bank were assessed, for the purposes of state, county, and city taxation for the year 1897, at \$112.34 per share; their book value for that year being about \$140 per share. The bill charges that by the act of assembly of Maryland of 1896, c. 143, a new section, to be designated as section 201, was added to article 81 of the Code of Public General Laws of Maryland. It is this section which gives rise to the controversy. It is as follows:

"Sec. 201. (1) All bonds, certificates of indebtedness, or evidences of debt, in whatsoever form made or issued by any public or private corporation incorporated by this state or any other state, territory, district or foreign country, or issued by any state (except the state of Maryland), territory, district or foreign country, not exempt from taxation by the laws of this state, and owned by residents of Maryland, shall be subject to valuation and assessment to the owner thereof in the county or city in which such owners may respectively reside, and they shall be assessed at their actual value in the market, and such upon which no interest shall be actually paid, shall not be valued at all, and there shall be paid upon such valuation thirty cents (and no more) on each one hundred dollars for county, city and municipal taxation in such county or city of this state in which the owner may reside. (2) All shares of stock or shares in any bank, other than a national bank, or in any company or corporation incorporated by or located in and doing business in any other state, or District of Columbia, or in any terri-

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tory or foreign country, owned by residents of this state, shall be valued and assessed for the purpose of state, county and municipal taxation to the owners thereof in the county or city in which such owners may reside, and said shares shall be assessed and valued at their actual value in the market and those upon which no dividend shall be actually paid, shall not be valued at all, and upon the valuation so made the regular rate of taxation for state purposes shall be paid, and there shall also be paid on such valuation thirty cents (and no more) on each hundred dollars for county, city and municipal taxation in such county or city of this state in which the owners may reside."

Section 194, c. 120, of the same act of 1896, provided for the valuation and assessment of all bonds, certificates of indebtedness, or evidences of debt upon a sliding scale, according to the rate of interest therein stipulated to be paid, those bearing interest at 6 per centum to be assessed at 50 per centum of their face value, those bearing interest at 5 per centum to be assessed at $41\frac{2}{3}$ per centum of their face value, and so on, the rate of assessment diminishing in proportion to the lowering of the rate of interest. This section was brought to the attention of the court by way of amendment, which alleged that section 194, so far as it relates to bonds, certificates of indebtedness, or evidences of debt, made or issued by corporations or by states, etc., was repealed by chapter 143, above cited, but that the same, so far as it relates to certificates of indebtedness issued by any individual or firm, is still in force and operation. To this amendment the defendants demurred, and the demurrer was sustained.

Sections 143 and 194 both provide for a mode of valuation and assessment of certain kinds of personal property at a different and lower valuation than that of national bank stock, and, in the view of the complainant, either is equally obnoxious. The main contention being over section 201, further reference to section 194 does not seem to be necessary. The sole question is whether the scheme of valuation and

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assessment of the property and credits therein specified, which provides that no more than 30 cents on each \$100 of valuation thereof shall be paid for state, county, and municipal taxation, while the shares of national banks are taxed for municipal purposes at the rate of \$2 upon every \$100 of valuation, is in accord with the restriction embodied in section 5219 of the Revised Statutes of the United States, providing that the taxation of such shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." If the subjects of taxation enumerated in section 201 are "moneyed capital," within the purview of section 5219 of the Revised Statutes, it would follow as of course that the complainants are entitled to the relief sought, for it is only by virtue of said section that the states or municipalities have the right to tax national bank shares at all, and any such taxation must be in accordance with the limitations therein prescribed.

It is not contended that the legislation in question was inspired by any sentiment of hostility to the national banks, or that there was any intention to make an unjust discrimination against them, but it is claimed that in the practical operation of this system of taxation an unjust discrimination, obnoxious to section 5219, is effected; the main contention being that certain private bankers, whose business is competitive with the national banks, by investing their capital in the securities mentioned in section 201, which are valued and assessed at 30 cents on the \$100, have thereby an advantage over the national banks, whose shares are subject to taxation at the rate of \$2 upon the \$100 of their valuation. The shares of all incorporated banks and trust companies in Baltimore are assessed in like manner with the shares of the national banks, and are taxed upon the same valuation, and there is no claim that there is any discrimination in their favor.

An examination of the tax laws of the state of Maryland shows a plain intention to bring within the range of taxation every kind and description of property, real and personal,

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Deposits in savings banks, which, in most of the states, are from motives of public policy exempted, are taxed at one-fourth of 1 per cent., and, after the enumeration of the many and various subjects of taxation, Act 1896, c. 120, provides that "all other property of every kind, nature and description within this state, except as provided by the fourth section of this article, shall be valued and assessed for the purpose of state, county and municipal taxation to the respective owners thereof, in the manner prescribed by this article." Inasmuch as every other kind of property, including shares in every kind of corporation, is valued, assessed, and taxed at the same rate as are shares of national banks,—that is to say, at the rate \$2 on every \$100,—it is manifest that the scheme of valuation and assessment provided in section 201 is due to some other cause than to a desire to discriminate in favor of the kind of property embraced in that section. It is not difficult to find from the testimony in this case and in our knowledge of human nature the reasons for this discrimination.

The taxation of personal property has always and everywhere been a vexatious problem. Horses and cattle, wagons and carriages, the implements of husbandry and household furniture,—all things, in fact, which are visible, and cannot readily be concealed, including therein shares in incorporated companies, which may be compelled by the law creating them to make returns,—are within comparatively easy reach of the tax assessors. But the great mass of personal property, in which the wealth of a country is invested, consisting of bonds and other evidences of credit, which can be readily hidden, escape the eye of the assessor, and nothing is more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy or equality, and this is not for want of long-sustained and earnest effort to accomplish it. There is a monotonous uniformity in the reports of the failures of every system attempted, however stringent may be the legislation, or however arbitrary or despotic may be the powers with which the assessors may be clothed.

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The heavy hand of the taxgatherer always falls upon the widow and the orphan, upon trustees and guardians, whose estates are required by law to be revealed to the courts of probate, and upon those only whose consciences are unusually scrupulous, and who, having least experience in business, are least able to bear the burden, while the most inadequate returns are invariably made by the rich, who are usually most ingenious in evasion, and most fertile in expedients to escape taxation. The result is that always and everywhere no appreciable part of such intangible property is reached by laws, however ingeniously framed or severely enforced. The heavy and ever-increasing rate of taxation in our cities makes this result inevitable. Safe investments are rarely found which yield more than 4 per cent., and, the rate of taxation being generally from 2 to 3 per cent., it is not to be wondered at that there should be endeavor to escape a burden which takes more than half of their income. Evasion and downright perjury is the consequence. The legislation complained of is the outgrowth of this state of things, which is not peculiar to the state of Maryland, but the lawmakers of that state, having in view that trait of human nature which impels the man of average honesty to be in matters of taxation about as honest as he thinks he can afford to be have endeavored to bring hoarded wealth from its hiding, by the promise of taxation at a rate which would not be practically confiscatory, with the result that over \$50,000,000 of property has been returned for taxation which had never before been brought to light. The exact figures are that before the passage of this act \$5,481,047 was returned, the greater part of this amount belonging to trust estates, while in the year following \$58,885,000 was returned for taxation; and the precise question now presented for determination is whether the valuation of this property for purposes of taxation at 30 cents on the \$100 works such a discrimination against national banks that the courts should be compelled to declare this legislation void, as obnoxious to the provisions of the statute of the United States intended to prevent hostile discrimination against national banks.

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It is obvious, from examination of the whole scheme of taxation of which section 201 is part, that it was inspired by no spirit of hostility to the national banks, or to corporations generally; for the state banks and trust companies, which do a business similar to that of the national banks, are on precisely the same plane with them, and all corporations chartered by the state of Maryland are assessed at the same rate. That bonds and other evidences of debt are in a certain sense moneyed capital can hardly be disputed, for any money invested in commercial or manufacturing enterprises is in one sense moneyed capital. A lawyer's investment in his books, a mechanic's investment in his tools, represent capital which is measurable in terms of money; but obviously the congress, if it had intended to include in its inhibition all capital in form of investment, would have used some such comprehensive term as "personal property," and it must be assumed that the words "other moneyed capital" were employed deliberately, to denote more restricted forms of invested capital. It seems to be the plain intention of this proviso to protect the corporations formed under the authority of congress from unfriendly discriminations that would come from the taxing powers of the states being exerted in such a way as would enable their citizens, engaged in like business, to compete with the national banks upon unfair and unequal terms. Any legislation which prescribed a lower rate of taxation upon moneyed capital in the hands of individuals than that imposed upon the moneyed capital of the banks would clearly fall within the inhibition, and it would be equally obnoxious, whether this result was accomplished indirectly or directly. If the legislation complained of was framed with the intent or if its necessary consequence is to foster such unequal competition, then it must fall under condemnation; for, the right of the state to tax these shares at all being given by congress, it must be exercised in accordance with the limitation prescribed, which in terms provides that such taxation shall not be at "a greater rate than is assessed

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upon other moneyed capital in the hands of individual citizens of such state." It is equality of assessment with other moneyed capital that is sought to be attained by this proviso, not equality with personal property generally. Railroad companies, manufacturing or mining companies, and the various commercial enterprises in which capital is employed, are not within the contemplation of the proviso; for they do not come into competition with national banks, and congress does not undertake to prescribe methods or limitations upon the taxation of such property.

The words "moneyed capital" not having been defined by the statute, it has been left to the courts to interpret them, and they have been so frequently considered by the supreme court of the United States that there is little difficulty in ascertaining what that court construes them to mean. The leading case is *Mer-*
cantile Nat. Bank v. City of New York, 121 U. S. 157, 7
 Sup. Ct. 826, 30 L. Ed. 895, and the last case is *First Nat.*
Bank of Aberdeen v. Chehalis Co., 166 U. S. 440, 17 Sup.
 Ct. 629, 41 L. Ed. 1069. In these two will be found a review
 of nearly all of the decisions. It would serve no good pur-
 pose to restate them. The result of them all is that "mon-
 eyed capital" has been given a restricted meaning. It is the
 nature of the employment that fixes its character. Wher-
 ever money is employed in the carrying on of a business, the
 object of which is the making of profit by its use as money,
 it is moneyed capital. When such capital is invested in
 loans or securities of a permanent or temporary character, if
 it is so invested with a view to sale and reinvestment for the
 purpose of making money by the operation, it is moneyed
 capital. The securities themselves do not necessarily come
 within the definition. In other words, moneyed capital is
 the tool or instrument; bonds and other securities are the
 material in and with which it operates.

Same—Same—
 Same—"Moneyed
 Capital."

The policy and purpose of congress was to protect the instrumentalities created by it from unfair competition, by

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requiring that all persons engaged in like business should pay upon the capital so employed a like and equal rate of taxation. The true test is the nature of the business in which the person is engaged, and that cannot be determined by the character of the investment. Moneyed capital does not mean all capital the value of which is measured in terms of money. It has been held that stocks and bonds of insurance, wharf, gas, and other miscellaneous corporations might be entirely exempted from taxation, although such companies may be engaged in business for the pecuniary profit of their shareholders, and employ moneyed capital in their operations, because, from the nature of their business, they are not competitors with the national banks. So, too, municipal bonds may be exempted altogether from taxation, because they are not within the reason of the rule established by congress for the taxation of national bank shares, and the tax on personal property generally is not the measure of the tax on shares of national banks. The exemption from taxation of savings banks has been sustained, although it seems clear that deposits are moneyed capital, because it has been held that their business does not come into competition with national banks, and because it is the obvious interest and policy of the states to promote their growth. The specific function of the national bank, as declared by subdivision 7 of section 5136 of the Revised Statutes, is as follows :

“To exercise by its board of directors, or duly authorized officers or agents, subject to law all such incidental powers as shall be necessary to carry on the business of banking ; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt ; by receiving deposits ; by buying and selling exchange, coin, and bullion ; by loaning money on personal security ; and by obtaining, issuing and circulating notes according to the provisions of this title.

The business of banking, as defined by MR. JUSTICE MATTHEWS in the Mercantile Nat. Bank Case, *supra*, is of somewhat wider scope. It is as follows :

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“The business of banking, as defined by law and custom, consists in the issue of notes, payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans on collateral security; buying and selling bills of exchange; negotiating loans; and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations.”

It will be observed that the “dealing in negotiable securities” is not one of the functions of the national bank prescribed by the law of its creation. That is commonly considered the business of a broker, but we are not required in this case to determine whether or not it is the proper business of a national bank.

The law is well settled that any legislation which imposes a lower rate of taxation upon the capital of individuals engaged in the banking business, as above defined, than is imposed upon national banks, is obnoxious to section 5219. Whether the tax law of Maryland is of that character must now be determined. The section complained of has already been cited. It provides, in substance, that all bonds, certificates of indebtedness, or evidences of debt, and all shares of stock in any bank or other corporation incorporated by any other state, owned by residents of Maryland, shall be valued and assessed at their actual value in the market, and that taxes shall be paid on such valuation at the rate of 30 cents on each \$100. This section does not provide, nor purport to provide, either method of valuation or rate of taxation upon the capital of individuals engaged in the banking business. Its purpose, and its only purpose, was to bring within the range of a moderate taxation property which theretofore escaped all taxation. If this section is stricken out, will the national banks be in any better plight? Would it follow that the capital of the firms of private bankers, which it is claimed eludes an equal share with them in the burden of taxation,

Same—Same—
Same—Shares
in Foreign
Corporations.

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could be brought within the reach of the tax assessor by its annulment?

The competition claimed to be injurious arises, it is alleged, in two ways—First, by the sending to Baltimore to be loaned large sums of money by corporations and companies outside of the state, the local holders of whose shares are taxed, by subdivision 2 of section 201, only at the rate of 30 cents upon the \$100 of their holdings. How much of such foreign capital is brought to Baltimore, and to what extent and how such corporations are taxed in the states where they are incorporated, the record does not show. It does not seem possible that the taxing or the nontaxing of Maryland shareholders of such corporations can have any effect upon such competition, and it seems to be entirely within the competence of the state to omit altogether from its list of subjects of taxation the holdings of its citizens in foreign corporations, as the property of such corporations is generally taxed in the situs of their creation, and other taxation is double taxation.

There is in the world a large amount of accumulated capital seeking investment,—a loan fund, national and international, which goes where it is wanted, as mobile as the beads of quicksilver. It eludes taxation everywhere, yet no community would willingly erect barriers against its coming. It is governed by no law except the law of supply and demand, and taxation to the point of confiscation of the shares of citizens of Baltimore in foreign corporations would be utterly futile to prevent such competition, if the local conditions in that city promised a profitable return upon such capital.

The second ground of contention is that private bankers in Baltimore, by investing their capital in the bonds, certificates of indebtedness, and evidences of debt described in subdivision 1 of section 201, upon which they are taxed at the rate of 30 cents upon \$100, are thereby enabled to compete unfairly with the national banks. If that is satisfactorily proved, it would seem that the contention is meritorious. An examination of the record will disclose how far the contention is maintained.

Same—Same—
Same—Same.

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These firms of private bankers not being incorporated, it is impossible for us to ascertain what amount of capital is employed by them in the banking business which is competitive with the national banks. It appears from the testimony that these firms are also brokers and promoters. The testimony of the complainant is that, by reports of commercial agencies, the aggregate capital of these firms is about \$10,000,000. These reports have not been verified by any proof, and therefore can have little weight as evidence of the fact. We are left entirely in the dark as to how much of this supposed capital is invested in government bonds, which are not taxable, and how much is invested in real estate and in the shares of local corporations, which are fully taxed, and how much is merely supposititious; for it is not an unheard of thing for men to get credit for capital which they do not possess. And we are equally unenlightened as to the amount of capital returned by these private bankers for taxation. One of them, examined by the complainant, testified that he made no returns of his capital as capital, but he was not interrogated as to the amount of his capital; and he further testified that a great part of his business was in stocks of domestic corporations, which were fully taxed, and that he paid at the rate of 30 cents on the bonds held at the time of assessment. One of the bankers examined by the defendants testified that his firm made full returns of its capital, and paid the full tax of \$2 on the \$100 thereon, and there was testimony that another firm did the same thing. The tax collector of the city of Baltimore testified that he did not know of any capital employed in the banking business that did not pay at the regular local rate, and that after this investigation was begun he summoned before him the bankers who were mentioned in the testimony for the complainant as paying only at the rate of 30 cents on the \$100 on certain securities, and not upon capital, and, after a hearing and upon affidavits submitted, "he was fully satisfied that they were paying on their capital at the regular city

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rate." He says: "I felt satisfied that the correct assessments were being made."

Whatever may be the fact, the record fails to sustain the contention of the complainant that the capital of private bankers, employed in the banking business, in competition with the national banks, is taxed at a lower rate than is the capital of such banks. That was the conclusion of the careful and learned district judge who heard the case below. His conclusions on questions of fact are justly entitled to great weight, and our examination of the testimony leads us to entire agreement with him, although, on first impression, there seemed ground for suspicion, at least, that much private capital escaped its full share of taxation, arising somewhat from the circumstance that it does not appear that in the tax laws of Maryland there is any provision for the taxation of such capital *eo nomine*. It is asserted by the defendant that such capital is returnable for taxation under the clause of the tax law of 1896 which is as follows:

"All other property of every kind, nature and description within this state, except as provided by the fourth section of this article, shall be valued and assessed for the purpose of state, county and municipal taxation to the respective owners thereof in the manner prescribed by this article."

However that may be, we have the proof that some of the capital of private bankers is returned and taxed at the full rate, and no sufficient proof that any material portion of such taxable capital is not returned. If there is an omission to assess and tax such capital at full rates, such omission is in no wise due to section 201, which does not relate to that subject, and annulment of that section would not remedy the evil complained of; for, as already stated, the design and effect of that section was to put upon the tax books a large amount of property, in the shape of invested capital, which before the passage of this act was not taxed at all.

There is nothing in the statutes of the United States relating to national banks which inhibits the states from differential taxation generally. State policy may legitimately

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dictate different modes and rates of taxation. It may foster some interests, and discourage others, by diversity in rates of taxation. If unrestrained by its own constitution, it may exempt altogether certain kinds of property for the purpose of building up manufacturing industries. As MR. JUSTICE BRADLEY says in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, in a case arising under the fourteenth amendment, which forbids the denying of the equal protection of the laws :

"It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of exercise upon various products. It may tax real and personal property in a different manner. It may tax visible property only, and not tax securities for the payment of money. It may allow deductions for indebtedness or not allow them. * * * But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

A law fair on its face might be administered with an evil eye and unequal hand, moved by prejudice or favoritism or other improper motives difficult of detection, so as to make an unjust and illegal discrimination; but there is no allegation or proof in this case that the assessing officers have failed to perform their whole duty, and the bill of complaint is not based upon any dereliction of duty on their part.

There are many difficulties inherent in the nature of the subject which prevent the ascertainment with absolute certainty of the amount of taxable moneyed capital employed by private bankers and brokers in the operations in which they are engaged. It is within common knowledge that a great deal of business is done by such bankers with borrowed capital. The complainant bank itself furnishes an illustra-

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tion. With a capital of \$1,210,700, its loans and discounts, as appear by its last report, amount to \$2,116,442.47. Properly enough, it makes no return of, and is not taxed upon, the securities in which its money is invested. It is taxed only upon its capital stock. It is quite within the range of possibility, if not of probability, that some of the private firms of bankers, the integrity of whose returns is impeached at least by implication, may be conducting very large operations in the securities in question upon borrowed money and with very little of their own capital. That might well be the case with bankers in good credit, and known to be possessed of large means; for the very essence of good banking is to make money for yourself by using the money of other people.

That there should be \$10,000,000 of taxable moneyed capital within easy reach of the all-devouring maw of the municipal taxgatherer, justly liable to a tax of \$2 upon every \$100, which escapes by the payment of 30 cents upon the \$100, is a proposition which requires proof to sustain it. No court could predicate a judgment upon such a violent presumption, in face of the positive testimony of the officer whose duty it is to assess, and whose character and capacity is unimpeached, that all such capital is correctly assessed, and that the full city rate is paid thereon. All that can be fairly claimed by the complainant is that some of these bankers do not make returns of their capital, because the law does not specifically require it, and that some moneyed capital thereby escapes the full rate of taxation. How much of this capital thus escapes we have no means of determining. The fact that some property escapes taxation, not shown to be an appreciable portion of the whole, furnishes no ground for relief. In *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112, it was contended that no municipal taxes could be collected upon shares of the national bank, because by the laws of Pennsylvania other moneyed capital in the hands of individual citizens was exempt from taxation; and it was shown that in the borough of Carlisle, where the bank was

Notes

located, all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate were exempt from taxation, except for state purposes. Says CHIEF JUSTICE WAITE: "It could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt; certainly there is no presumption in favor of such an intention. To have effect, it must be manifest." The decree of the circuit court is affirmed.

NOTES.

State Taxation of National Banks—"Moneyed Capital"—Discrimination.—The term "moneyed capital," as used in section 5219 of the Revised Statutes of the United States, does not include capital which does not come in competition with the business of national banks, and exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute. *First Nat. Bank of Wellington v. Chapman* (U. S.), 1 Banking Cas. 325.

The federal statute (Rev. St. U. S., § 5219) does not require that no greater tax shall be imposed on shares of stock in national banks than on shares of stock in insurance, wharf and gas companies, or other capital and credits which do not compete with national banks. *First Nat. Bank v. Chehalis*, 166 U. S. 440; *Nat. Bank v. Seattle*, 166 U. S. 463.

The paramount object of the restriction by the act of congress upon the taxation of shares in the national banks by the several states is aptly stated by MR. JUSTICE MATHEWS in *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, in which case, after stating the doctrine of previous cases, he added: "The main purpose, therefore, of congress, in fixing limits to state taxation on investments in shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy."

The phrase "moneyed capital," as generally employed, distinguishes such capital from other personal property and investments in the various manufacturing and industrial enterprises of citizens. Mc-

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Mahou *v.* Palmer, 102 N. Y. 176, 55 Am. Rep. 596, 12 Am. & Eng. Corp. Cas. 297.

Trust companies, although having the same powers as private banks and bankers, are not in competition with national banks. Jenkins *v.* Neff, 163 N. Y. 320.

"Moneyed capital" has been defined, in this connection, to be "capital employed in a business in which the stock in trade from which profits are expected to accrue is money, under which term are embraced absolute money, legal substitutes therefor, and money's commercial representatives." First Nat. Bank *v.* Turner (Ind.), 57 N. E. Rep. 110.

In Primm *v.* Fort (Tex.), 57 S. W. Rep. 972, it was held that "moneyed capital," within the meaning of the Federal statute, was such as was owned by natural persons, not that of corporations.

Nor is a state required to impose the same tax on building and loan associations as on national banks. Consolidated Nat. Bank *v.* Pima County (Ariz.), 48 Pac. Rep. 291.

Same—Trust Companies—Life Insurance Companies.—As to apparent discriminations between trust companies, or life insurance companies, and national banks, see Mercantile National Bank *v.* Mayor of New York, 121 U. S. 138, 18 Am. & Eng. Corp. Cas. 92; National Bank *v.* Mayor of the City of Newark, 121 U. S. 163, 18 Am. & Eng. Corp. Cas. 114.

Same—Exemption of All Savings Banks.—The exemption of savings banks does not operate as an unfriendly discrimination. Mercantile National Bank *v.* Mayor of New York, 121 U. S. 138, 18 Am. & Eng. Corp. Cas. 92; Davenport National Bank *v.* Board of Equalization (Iowa), 6 Am. & Eng. Corp. Cas. 447.

COMMERCIAL NAT. BANK

v.

CHAMBERS, COUNTY TREASURER.

(*Supreme Court of Utah, April 10, 1900.*)

National Banks—Tax Assessments — Deductions — Discrimination—Constitutional and Statutory Provisions.—Under sections 2, 3, art. 13, Const., and subdivisions 6, 7, § 2505 and sections 2506–2508, Rev. St. 1898, the only deductions authorized in the assessment for taxes of the shares of any national bank or other corporation, organized and doing business in this state, are deductions from the

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value of the shares of the value of the real estate which is represented by the stock, and which has been assessed, and deductions of *bona fide* debts from credits, and there is no unfriendly discrimination therein in favor of state corporations and against national banks.

Same—State Taxation.—Although a national bank is organized under the banking act of the United States, if it is located in this state, and conducting its business here, all its property, not exempt, situate, or held, owned, and used, within this jurisdiction, is within the taxing power of this state, under the provisions of section 5219, Rev. St. U. S., and such power extends to every species of property which exists within the limits of the state by its authority, or which is introduced by permission of the state, unless such power be excluded expressly or by necessary implication.

Same—Same—Situs of Property.—Under the power of taxation, property must be treated as it exists within the jurisdiction of such taxing power, and without reference to the powers of another state over which there is no jurisdiction whatever.

Same—Same—Deductions—Situs of Corporate Stock—Property beyond Jurisdiction.—A state has the right to fix the particular situs of the stock of a corporation doing business within its limits, for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control.

Same—Same—Stocks—Credits—Deductions—Debts of Shareholder.*—"Stocks" are not "credits," and "credits" are not "stocks," within the meaning of the revenue act of this state, and the law does not authorize the deduction of the debts of the individual shareholder in a bank from his shares of stock.

Same—Same—"Moneyed Capital"—Deductions—Debts of Shareholder—Stock—Credits.†—The term "moneyed capital," employed in section 5219, Rev. St. U. S., does not require that where, under a system of taxation such as ours, debts may be deducted from credits, the individual debts of a shareholder in a national bank must be deducted from the value of his stock; neither does the term include money which does not come into competition with the business of the bank. Debts disconnected from such business cannot be deducted from the amount of the capital, and the shares of stock cannot be treated as credits.

(Syllabus by the Court.)

*See notes at end of case.

†See *Nat. Bank of Baltimore v. Mayor, etc., of Baltimore* (C. C. A.), *ante*, p. 665, and *note*, p. 681.

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APPEAL by defendant from Weber county district court.
Reversed.

George Halverson, for appellant.

Heywood & Tail, for respondent.

BARTCH, C. J. This suit was brought by the plaintiff against the treasurer of Weber county to have declared void all taxes assessed against the bank for the year 1898 in excess of \$612.99, and to have the treasurer enjoined from collecting such excess, and from enforcing the collection by sale of the property assessed or otherwise. The findings of fact show that the plaintiff bank is a corporation organized and existing by virtue of the banking act of the United States, and has been, and now is, conducting a general banking business, as a national bank, in Ogden City, Weber county, Utah. For the purposes of taxation, the bank's capital stock, in 1898, was valued at \$80,000, its real estate situate in Utah was valued at \$27,535, and its real estate situate outside of this state at \$19,500. In levying the tax the value of the real estate situate within the state was deducted from the value of the stock, but a deduction of the value of the real estate situate without the state was refused. Likewise the *bona fide* debts of resident shareholders were deducted from the value of the stock, and deduction refused of such debts of nonresident shareholders. The total amount of tax levied against the stock, and claimed by the defendant, for that year is \$1,471.73. The amount offered to be paid by the plaintiff is \$612.99. At the trial the court entered a decree in favor of the plaintiff, and this appeal is from that decree.

The material question is, was the respondent entitled to deductions from the stock assessment for the value of the real estate situate without the limits of this state, and to have the *bona fide* debts of nonresident shareholders deducted from the value of their stock? The appellant insists that the court erred in allowing such deductions. Whether or not this insistence is sound must be determined by reference

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to the constitutional and statutory provisions relating to the subject. In section 2, art. 13, Const., it is provided: "All property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed." Under this provision, all property in this state must be "taxed in proportion to its value," except such as is exempt under the provisions of the constitution, or by virtue of the constitution of the United States. It will be observed that "credits" and "stocks" are included within the meaning of the word "property," as used in reference to the subjects of taxation, and these two classes are separately and distinctly mentioned as being included. All kinds of credits and stocks are therefore susceptible of being taxed, except as may be otherwise provided by the fundamental law. In the same section, as will be noticed, it is provided that stocks of any company or corporation are not taxable "when the property of such company or corporation represented by such stocks has been taxed." The word "stocks" is in the plural form, and, as here used, evidently means property consisting of shares in joint-stock companies, whether of banking institutions or other corporations. It is referred to as a distinct species of property. The word "credits" is also in the plural form, and, as here used, evidently means all debts due and owing from whatever source, to the party whose property is to be taxed. The word, as employed in this provision, clearly refers to a species of property entirely distinct and different from that of stocks. Thus, under section 2, art. 13, of the constitution, all "credits" would be subject to taxation were it not for the limitation contained

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in section 3 of the same enactment, which reads: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in proportion to the value of his, her or its property: provided, that a deduction of debts from credits may be authorized." Here is a provision that "debts" may be deducted from "credits" in the taxation of property. To the extent, therefore, that the debts owing by any person whose property is being taxed offset the credits or debts owing to him, the credits cannot be taxed, and to that extent this provision is a limitation upon section 2. Stocks, however, are not included in the limitation, they not being included within the proviso, and here we apprehend the maxim, "*Expressio unius est exclusio alterius*," applies. The framers of the constitution having thus referred to "credits" and "stocks" as separate species of property for the purposes of taxation, and, having provided different limitations as to each, they must, for such purposes, be treated separately and distinctly. It may further be observed that, according to the terms of section 3, every species of property in the state, except, of course, such as is exempt, must be taxed "according to its value in money," by a "uniform and equal rate of assessment" and a "just valuation," which must be provided for by the legislature, and the injunction for this is, "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." In *Judge v. Spencer*, 15 Utah 242, 48 Pac. 1097, where the question was whether mortgages were taxable, this court, after considering section 2, and referring to section 3, said: "This provision made it incumbent upon the legislature to provide a uniform system by which every species of property within the state, not exempt by the organic law, should equally and ratably bear its due proportion of the public burden, and the legislature had no

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power to exempt property not exempt under the constitution. The intention manifest from the several provisions of that instrument, respecting revenue and taxation, is not only that previous territorial legislation as to such exemptions should be repealed, but also that no power should exist in the state government to grant exemptions other than those mentioned in the constitution."

It will also be seen upon examination that in neither of the constitutional provisions is there any direct reference, with respect to taxation, to corporate property situate without the limits of the state, nor is there any provision for the deduction of debts from stocks; and as in the organic law "credits" and "stocks" of corporations are treated as separate species of property, and the legislature is commanded to provide by law uniform and equal rates of assessment, and for just valuation, of every kind of taxable property within the state, it becomes important to ascertain what the statute law respecting the matters under consideration is.

Section 2506, Rev. St., requires all property to be "assessed at its full value," agreeably to section 2 of the constitution.

Section 2507, *Id.*, reads: "The stockholders in every bank or banking association organized under the authority of this state or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each." In this case there is no

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contention that the tax was not assessed, nor that no statement was furnished the assessor as provided.

Section 2508, *Id.*, reads: "In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state." Under this provision every stockholder of a bank, whether a resident or nonresident of this state, is entitled to and must be allowed all the deductions and exemptions in the assessment of his shares as are allowed in the taxation of other taxable personal property owned by a resident citizen, and the rate must not be greater than is assessed upon other moneyed capital in the hands of such a citizen. There is, however, nothing in this provision authorizing the deduction of debts from the value of stocks in the hands either of a resident or nonresident individual. The only deductions authorized are debts from credits. "The term 'credit' means those solvent debts, secured or unsecured, owing to a person." Subdivision 6, § 2505, *Id.* "The term 'debts' means those secured or unsecured liabilities owing by a person." Subdivision 7, § 6, *Id.* Nor can the words, "moneyed capital," employed in section 2508, have the effect to enlarge the meaning of the term "credits," as used in the constitution and statute, so as to include bank stocks, and then permit the deduction of debts from the value of shares in national banks. Nor can those words have such an effect as to any other corporation. As we have seen, stocks are not "credits," within the meaning of the constitution. Stock is not an indebtedness due the owner, but simply an interest in the assets or property of the corporation. *Niles v. Shaw*, 50 Ohio St. 370, 34 N. E. 162; *Bridgman v. City of Keokuk*, 72 Iowa 42, 33 N. W. 355.

Section 2509, Rev. St., provides: "In making such as-

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assessment, there must also be deducted from the value of such shares, such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held, bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association." Here is a provision which permits a deduction from the value of the shares in banking institutions of the value of the real estate, where such real estate, held by the bank and represented by such shares, has been taxed. Real estate so held is assessed to the bank and taxed the same as real property held by an individual is taxed to him, and therefore its value is deducted from the value of the shares so as to avoid double assessment. This is in harmony with section 2, art. 13, of the constitution, above considered.

The remaining section of the Revised Statutes material in this case is 2518, which, among other things, provides that, "in making up the amount of credits which any person is required to list, he will be entitled to deduct from the gross amount of such credits the amount of all *bona fide* debts owing by him." This accords with section 3, art. 13, of the constitution, which authorizes a deduction of debts from credits.

Thus, from an examination of the several constitutional and statutory provisions respecting the subject of taxation, it is evident that the only deductions which are authorized in the assessment of the shares of stock of any national bank or other corporation organized and doing business in this state are deductions from the value of the shares of the value of the real estate which is represented by the stock, and which has been assessed, and deductions of *bona fide* debts from credits. It is also clear that moneyed capital invested in national banks is placed precisely upon the same basis as moneyed capital invested in other banks, and that there is no unfriendly discrimination in favor of state corporations.

National Banks—
Tax Assess-
ments—Deduc-
tions—Dis-
crimination—
Constitutional
and Statutory
Provisions.

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In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but deductions for its real estate situate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred. It is true the bank is a corporation organized under the banking act of the United States, but it is located in this state, and is conducting its business here. All of its property, therefore, not exempt, situate, or held, owned, and used, within this jurisdiction, is within the taxing power of this state. The power of taxation extends to every species of property which exists within the limits of the state by its authority, or which is introduced by permission of the state, unless such power be excluded expressly or by necessary implication. A national bank, although a United States institution and subject to its control, is taxable in the state where located, by consent of congress, as will hereinafter be seen.

The property of the respondent bank being thus within the taxing power of the state, it must be taxed as provided by our laws, the same as other property, and, as we have seen, our constitution and statutes provide that all taxable property shall be taxed according to its value in money, which has been construed to be at its full cash value, and banking corporations are to be taxed on the value of the stock at the place where the corporation is located, and not elsewhere. Now, if the value of its real estate situate in other states, where this state has no jurisdiction, is to be deducted from the value of the stock, how can the stock of the bank be taxed at its cash value? Yet stock is "property," within the meaning of the constitution and statute. When its real property situate within the state is taxed, then its value should be deducted from the value of the stock which represents such real property;

Same—State
Taxation.

Same—Same—
Situs of Prop-
erty.

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for otherwise there would be a double assessment, in that the same property would be taxed as other real estate and also as represented by the stock. In such case all the property is still taxed at its full cash value, but this is not so as to real estate situate in another state which cannot be taxed here. Under the power of taxation property must be treated as it exists here, without reference to that of another state, where we have no jurisdiction whatever. Stock of a bank or corporation located in this state, being property within the meaning of our revenue laws, must be treated as such.

Suppose, for instance, three-fourths of the property in value of the bank were situate in another state, and its stock here was worth 100 cents on the dollar, and for the purpose of taxation the value of such property were deducted from the value of the stock; could it be said that the stock was assessed at its cash value? The shares of stock of such a corporation are subject to state control in respect to the right of taxation, and therefore every person who takes them must take them subject to such control, and it matters not whether he be a resident or nonresident. The state has a right to fix a particular situs as to such stock for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. "The true criterion, as fixed by the statute, is the true value of the stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the

Same—Same—
Deductions—
Situs of Corpo-
rate Stock—Prop-
erty beyond
Jurisdiction.

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shares of stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this state." *American Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Dwight v. Mayor, etc.*, 12 Allen 316; *Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703; *Kelley v. Rhoads (Wyo.)*, 51 Pac. 593.

The question remains whether the individual stockholders were entitled to have their debts deducted from the value of their stock, or, rather, whether the bank was entitled to have such deductions made from the valuation of the capital stock. It appears that individual debts owed by resident shareholders were deducted from the value of their shares, but such deductions were refused nonresident shareholders by the assessing officers. The court, however, allowed the deductions also to be made as to nonresidents. Certainly, if shareholders who are residing in this state are entitled to deduct their debts from the value of their shares, those who are residing in another state are likewise entitled. The law permits no discrimination between the two classes of shareholders in national banks, and the distinction attempted to be made by the assessing officers would be a clear and unjust discrimination in favor of resident owners of stock, and it would be difficult to assign any good reason therefor, for the nonresident, the same as the resident, stockholder, may have debts which he owes in this state, and the capital of both alike is invested in the bank. No such discrimination is tolerated by the laws of this state or of the United States. Aside from the fact, however, that no such unfriendly discrimination can be permitted, by what authority can any such deduction be made, whether the stock be held by a resident or nonresident? In vain have we searched the constitution and statutory provisions of this state relating to the

Same—Same—
Stocks—Credits—
Deductions—
Debts of Share-
holder.

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subject of taxation for the existence of such a power, and none has been pointed out by counsel on either side. The constitution provides for the deduction of "debts" from "credits," but, as we have seen, that provision does not authorize a deduction of "debts" from "stocks." Stocks are not credits any more than credits are stocks, within the definition of the statute respecting the term "credit." As has already been observed, "credits" and "stocks," under our system of taxation, are separate and distinct species of property. Neither one includes the other, and, as the framers of our constitution have seen fit to single out and mention "credits" as the kind of property from which "debts" might be deducted, they have expressed an intention to prohibit the deduction of debts from any other species of property. The expression of the one excludes every other kind. No doubt the banking corporation in its capacity as an artificial person—as a distinct entity—has the right to have its debts contracted by it in the conduct of its banking business deducted from its credits or the moneyed capital employed, for that is necessary to determine the real value of the stock, which value amounts simply to what can be realized from the property of the corporation after its obligations are paid. This will reduce the value of the credits or capital in the amount of the debts, and, as the value of the credits or capital enters into the value of the shares, the value of the shares will be proportionately reduced for the purpose of the assessment. In this way the individual shareholder receives the benefit of the deduction of debts from credits, and such is the only way in which he is entitled to any deduction from the value of his stock. But the law does not authorize the bank to deduct debts disconnected from the banking business, nor the bank or shareholder to have his individual debts deducted from the value of his shares of stock. The debts incurred in the conduct of the corporate business are deducted from the credits or moneyed capital, so that the actual value of the capital employed may be determined, and the taxes levied thereon.

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Under the system of taxation prescribed by the constitution and statutes of this state, a banking corporation, state or national, has the same immunity from excessive taxation, and the same right to deductions of debts from credits, as any other corporation or any private person has; but "to place the holder of national bank shares into the class of bankers, and treat his shares as stocks until the net value is fixed, and then change his stock into a credit, and take him out of the class of bankers, and place him into the class of private individuals, so as to enable him still further to reduce his stock thus changed into a credit, by deducting therefrom his legal *bona fide* debts, would be discriminating in favor of such national bank shareholder and would be giving him two chances to escape taxation, while other bankers and private individuals have but one." *Chapman v. Bank*, 56 Ohio St. 310, 47 N. E. 54; *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669; *Dutton v. Bank*, 53 Kan. 440, 36 Pac. 719; *Bressler v. Wayne Co.*, 32 Neb. 834, 47 N. W. 787, 13 L. R. A. 614; *People v. Dolan*, 36 N. Y. 59; *National Bank of Commerce of Seattle v. City of Seattle*, 9 Wash. 608, 38 Pac. 219; *First Nat. Bank of St. Joseph v. St. Joseph*, 46 Mich. 526, 9 N. W. 838; *First Nat. Bank of Aberdeen v. Chehalis Co.*, 6 Wash. 64, 32 Pac. 1015; *Williams v. Weaver*, 75 N. Y. 30; *McVeagh v. City of Chicago*, 49 Ill. 318.

Nor are the provisions of our constitution and statutes respecting taxation in conflict with section 5219 of the Revised Statutes of the United States, which reads as follows:

Same—Same—
 "Moneyed Capital"—Deductions—Debts of Shareholder—Stock—Credits.

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation

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shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed." In this section the legislature of every state is given express power to include within the subjects of taxation the "shares of national banking associations located within the state," subject, however, to the restrictions that such shares shall not be taxed at a greater rate than "other moneyed capital in the hands of individual citizens of the state," and that those owned by nonresidents "shall be taxed in the city or town where the bank is located, and not elsewhere." Examination and comparison will show that the several sections of the constitution and Revised Statutes of this state, hereinbefore construed, are entirely in harmony with the federal statute. No purpose to discriminate against shareholders in national banks is manifest. The taxation of the shares and property of the two classes of banks, state and national, is precisely the same, and such shares and property are taxed at no higher rate than is the property of other corporations and of individuals. The assessment of all taxable property, whether of corporations or individuals, must be at its full cash value. Nor is it shown that the system of taxation pursued in this state discriminates in any way material in its practical operation against the holder of shares in national banks.

Under our laws such shares, the same as shares in state banks or other corporations, are known as stocks, or investments in stock, and are not credits from which debts can be deducted. Such stocks are not to be assessed at a different rate in one institution than in another. Stocks in national banks, in incorporated state banks, and in unincorporated banks are all subject to the same system of taxation, and we

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perceive no discrimination in favor of either class, nor as against either of those classes in favor of private taxable property. By enacting the federal statute, congress doubtless intended to establish a national banking system, so as to obtain a secure and uniform currency for the people, and facilitate the operations of the treasury of the United States. The banks under this system were to be furnished with private capital. The capital, so far as it was security for their circulating notes, was to be invested in United States bonds for the protection of the government and the people. Neither these bonds, nor the shares of stock held by individuals, nor the capital, however invested, nor the banks, were taxable by the states in which the banks were located, without the consent of congress. Such consent was granted, and power to tax them conferred upon the states by congress in the statute referred to, subject to the restrictions or limitations therein contained. Those limitations were doubtless necessary to prohibit discrimination in favor of state banks and individuals doing similar business, and the imposition of burdens which would prevent private capital from seeking investment in the institutions which it was the object of the enactment to establish and promote. "The main purpose," says MR. JUSTICE MATTHEWS in *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, "of congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy." There is nothing in the federal statute which prohibits the deduction of debts from credits when such deductions do not constitute an unfriendly discrimination against national banks. Nor does the term "moneyed capital," employed in that statute, require that where, as under our system of taxation, debts may be deducted from credits, the individual debts of a share-

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holder in a national bank must be deducted from the value of the stock. The term "moneyed capital" as there used does not include money which does not come into competition with the business of the bank, and debts disconnected from such business cannot be deducted from the amount of the capital. Nor can the shares of stock of such a bank be treated as credits. Therefore the refusal by the assessing officers, on application of the bank, to deduct the individual debts of nonresident shareholders from the value of the stock, is not an illegal discrimination against a national bank, and hence no such deduction can be enforced by the bank. *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, 40 L. Ed. 573; *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669; *First Nat. Bank of Aberdeen v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Bank of Commerce v. City of Seattle*, 166 U. S. 463, 17 Sup. Ct. 996, 41 L. Ed. 1079; *Mercantile Nat. Bank of City of New York v. Mayor, etc., of City of New York (C. C.)*, 28 Fed. 776; *Richards v. Incorporated Town of Rock Rapids (C. C.)*, 31 Fed. 505. We are of the opinion that the court erred in rendering a decree in favor of the plaintiff. Judgment ought to have been entered in favor of the defendant for costs. The case must therefore be reversed, with costs, and remanded, with instructions to the court below to set aside its decree, and enter judgment in accordance herewith. It is so ordered.

MINER and BASKIN, JJ., concur.

NOTES.

Taxation—National Bank Stock—Deduction of Indebtedness.—Where a state statute allows the deduction of the taxpayer's debts from the valuation of all his personal property subject to taxation, the same deduction must be allowed in the case of shares in national banks.

United States.—*New York v. Weaver*, 100 U. S. 539; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193.

In the case of *Evansville Nat. Bank v. Britton*, 105 U. S. 322, JUSTICE

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MILLER said, referring to the Indiana law: "We are of the opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of congress." *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Merchants' Nat. Bank*, *Id.* 153; *Board of Supervisors v. Stanley*, 105 U. S. 305.

In the case of *Boyer v. Boyer*, 113 U. S. 689, JUSTICE HARLAN, in an exhaustive opinion, reviews all the cases relating to this matter which have been decided in the United States supreme court, and deduces the following rules for the construction of the federal statute under consideration: "(1) That the words 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens,' refers to the entire process of assessment, which, in the case of national bank shares, includes both their valuation and the rate of percentage of such valuation; consequently that the act of congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national bank shares and of other moneyed investments or capital, the state law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital. (2) That a state law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than national bank shares, or which permits the taxpayer to deduct from the sum of his credits money at interest or other demands to the extent of his *bona fide* indebtedness, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital." *City Nat. Bank v. Paducah*, 2 Flap. (C. C.) 61; *Richards v. Rock Rapids*, 31 Fed. Rep. 505; *Evansville Nat. Bank v. Britton*, 10 Biss. (U. S.) 503.

Alabama.—*Sumter County v. National Bank*, 62 Ala. 464; *Pollard v. State*, 65 Ala. 628; *Maguire v. Com'rs*, 71 Ala. 401.

California.—*McHenry v. Downer*, 116 Cal. 20, 6 Am. & Eng. Corp. Cas., N. S., 113; *Miller v. Heilbron*, 58 Cal. 133.

Indiana.—*Indianapolis v. Vajen*, 111 Ind. 240; *Wasson v. First Nat. Bank*, 107 Ind. 206.

Iowa.—*First Nat. Bank v. Albia*, 85 Iowa 736, 38 Am. & Eng. Corp. Cas. 574.

Kansas.—*First Nat. Bank v. Fisher*, 45 Kan. 726, 34 Am. & Eng. Corp. Cas. 234.

In *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440, 48 Am. & Eng. Corp. Cas. 264, the court held that the statute of Kansas which permits

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debts owing in good faith by any person, company, or corporation to be deducted from the gross amount of credits belonging to such person, company, or corporation, in listing their property for taxation, when the owners of shares of stock in a national bank are not allowed to deduct their indebtedness from the value of such shares, is not in conflict with section 5219 of the Revised Statutes of the United States, does not operate to tax such shares at a greater rate than other moneyed capital in the hands of individual citizens, and is valid,—the law providing that all corporate stocks; all moneys secured by judgment, or lien on real estate; all moneys on deposit in any bank, subject to withdrawal on demand; and substantially all moneyed capital, of every description invested for profit,—shall be subject to taxation without deduction of indebtedness.

In *First Nat. Bank v. Ayers*, 160 U. S. 660, the validity of the Kansas statute was upheld, the court holding that the single fact that the statute permitted certain debts to be deducted from some moneyed capital, but not from that invested in national bank shares, was not sufficient to show a violation of Rev. St. U. S. § 5219.

New Hampshire.—*Peavey v. Greenfield*, 64 N. H. 284; *Weston v. Manchester*, 62 N. H. 574.

New York.—*People v. Com'rs*, 69 N. Y. 91.

North Carolina.—*McAden v. Mecklenburg Co. Com'rs*, 97 N. Car. 355.

Ohio.—*State Nat. Bank v. Shields*, 31 Ohio L. J. 321.

Under the Ohio system of taxation there is not an unfavorable discrimination against national bank shareholders, and in favor of unincorporated banks or bankers, in assessing the value of capital employed in business, as in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation. *First Nat. Bank of Wellington v. Chapman* (U. S.), 1 Banking Cas. 325.

Washington.—*Newport v. Mudgett*, 18 Wash. 271.

Wisconsin.—*Ruggles v. Fond du Lac*, 53 Wis. 436.

An assessment made without allowing such deduction is not void, but voidable in case the taxpayer was actually indebted. *Sup'rs v. Stanley*, 105 U. S. 305. In *Magnire v. Com'rs*, 71 Ala. 401, a statute so discriminating was held absolutely invalid.

Contra.—The fact that the deduction was allowed some property owners and denied to holders of shares in national banks has been held, in some instances, not to constitute a discrimination against national banks. *Smalley v. Burlington*, 63 Vt. 443; *Chapman v. First Nat. Bank*, 56 Ohio St. 310; *People v. Dolan*, 36 N. Y. 59; *Niles*

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v. Shaw, 50 Ohio St. 370; Rosenberg v. Weekes, 67 Tex. 578; Mc Veagh v. Chicago, 49 Ill. 318; Williams v. Weaver, 75 N. Y. 30.

In Bressler v. Wayne County, 32 Neb. 834, 38 Am. & Eng. Corp. Cas. 567, the court said: "The rule deducible from the decisions of the United States supreme court is that, where the rate fixed by the state for the taxation of capital in the hands of individual citizens, situated similarly to that invested in national banks, is not less than that placed upon national bank shares, the rule of uniformity prescribed by the act of congress is maintained, even though some moneyed capital in the state, which is invested by individuals in business or enterprises, which do not come in competition with national banks, is exempt from taxation, or is assessed at a less rate than is imposed upon shares of stock in national banks. It is obvious that the laws of this state providing for the taxation of national banks are in perfect harmony with this rule, and that the plaintiff in error has no legal ground to complain because he was not permitted to deduct the amount of his debts from the value of his national bank stock. If our statute permitted debts to be deducted from the value of all kinds of property, or from all credits, in listing the same for assessment, as the laws of some of the states allow, then the indebtedness of the owner of national bank shares would have to be deducted from the value of his shares. But the proviso clause of section 27 of the revenue law of this state provides that the rule which allows the deduction of debts from credits shall not 'apply to any bank, company, or corporation exercising banking powers or privileges.'

We therefore reach the conclusion that in this state, in the assessment of shares of national bank stock, the owners thereof are not entitled to deduct their *bona fide* indebtedness from the value of such shares of stock."

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BROAS *et al.*

(*Supreme Court of Michigan, April 18, 1899.*)

Banks—Stockholder's Statutory Liability—Enforcement.—The liability of the stockholders of a bank to its depositors to the amount of their stock at the par value thereof, in addition to said stock, provided for by section 46, Act No. 205, Mich. Pub. Acts 1887, is not a

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mere collateral undertaking, and may be enforced in law or equity by the bank's receiver as soon as it appears that its assets are insufficient to pay the depositors, it not being necessary to wait until such assets are exhausted.

Same—Same.*—Such liability is contractual, and not penal.

Same—Same—Constitutionality of Statute.—The contention that such act is unconstitutional, for the reason that it limits the personal liability of stockholders to depositors, while the state constitution provides that they shall be liable for all debts, cannot be sustained; as such constitutional provisions relate to banks of issue only, and the provisions of such act are only made applicable to banks not of issue.

Same—Same—Effect of Transfer of Stock.—Although such statute contains no declaration on the subject, it must be construed as providing that the stockholders liable to depositors are those who are such at the time the bank becomes insolvent and closes its doors, without reference to the time when the deposits were actually made.

Same—Same—Purchase of Stock Induced by Fraud.—A stockholder, after having purchased his stock and registered it, and permitted depositors to rely upon his ownership, cannot repudiate his liability under such statute, on the ground that he was induced to purchase the stock through fraudulent representations made as to its value by the officers of the bank.

Same—Same—Unregistered Stockholders.—The mere fact that his stock was never transferred to him on the books of the bank is no defense in an action against a transferee of stock to enforce such liability.

Same—Same—Unregistered Transfer.—E., when a stockholder in a solvent bank, and when he was liable to it for an overdraft, sold his stock to its cashier, who purchased it for himself, and delivered the stock certificate properly assigned to the latter, who had control of the stock register. E. received as payment for the stock a credit on his pass book to the amount of the overdraft, authorized by the cashier; but, when the bank closed its doors, E. was a registered stockholder, as appeared by the books of the bank, and the overdraft appeared thereon unpaid. *Held*, that such transfer discharged E. from liability as a stockholder, as much so as if the cashier had paid the purchase money from his own pocket, and had registered the transfer.

Same—Same—Fraudulent Transfer—Burden of Proof.—In an action to enforce such liability, the burden is upon the receiver of the bank to show that a transfer of stock was made by the stockholder for the fraudulent purpose of avoiding liability as such stockholder.

*See notes at end of case.

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Same—Same—Insolvency—Right to Transfer.—A stockholder has the right, even when the bank is insolvent, to make a *bona fide* sale of his stock to any person, whether resident or nonresident, capable in law of taking and holding the same, and of assuming the liabilities of the transferrer under such statute in respect thereto.

Same—Same—Transfer—Registry.*—The mere fact that a transfer of stock is not registered on the books of the bank will not prevent it from relieving the transferrer from liability under such statute.

Same—Same—Same—Effect of Transfer by Gift.—Although the bank is insolvent, a stockholder having no knowledge of such fact, may relieve himself from liability under such statute by making a *bona fide* transfer of the stock by gift to his son, although the latter is insolvent at the time of the transfer.

APPEAL by certain defendants from Ingham county circuit court. *Reversed in part.*

E. C. Chapin, M. D. Chatterton, William A. Fraser, and Bartlett Wiley, for appellants.

Russell C. Ostrander, for appellee.

LONG, J. Complainant is receiver of the People's Savings Bank. The defendants, it is claimed, are stockholders in that bank. This suit, by bill in equity, is brought to enforce the statutory liability of stockholders for the benefit of the depositors of the bank. The suit was commenced against all the resident stockholders, and a decree entered against them in the court below. Only the six defendants here have appealed, and each relies upon some special defense not common to the whole body of stockholders. There are some questions raised, however, which go to the jurisdiction, and in which all the defendants have a common interest. It appears that the bank was organized June 29, 1885, with a capital stock of \$25,000, and was permitted by its articles to do a savings business only. On July 5, 1889, amended articles were filed, adding a new clause, stating the bank to be both a commercial and savings bank. On January 23, 1892, the stockholders voted to increase the capital stock to \$150,000. The bank failed, and ceased

Case Stated.

*See notes at end of case.

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to do business on July 11, 1896. The reasons for such failure need not be set up here. The receiver took possession on July 15, 1896. He found on hand in the bank in cash \$2,915.95. There was a balance at the Chase National Bank, New York, of \$1,343.32. Excepting these two items, the bank had no cash. The total assets of the bank up to the time of the hearing of this case in the court below were \$394,050.65, as shown by the books of the bank, and of which the receiver estimates (and his estimate is not disputed) \$184,536.45 worthless and \$88,305.04 doubtful, leaving \$121,209.16 of good assets, which is about the amount of collateral pledged by the bank to secure the persons from whom it had borrowed money. He found the total liabilities of the bank, as shown from the books, exclusive of capital stock, to be \$249,140.63, showing a deficit over liabilities and capital stock, after taking out all the good and one-half of the doubtful assets, of over \$230,000. The claim of the receiver is that, having ascertained to his satisfaction that after exhausting all the assets of the bank the depositors would not be fully paid, and having also ascertained the amount of the deficiency, it was his duty to apply to the court by petition for an order judicially determining the necessity to proceed against the stockholders that the amount might be ascertained and an order obtained to enforce the liability. This proceeding was *ex parte*. The petition was filed, testimony taken, and the court found that it would require an assessment of 70 per cent. upon the stockholders to pay depositors and expenses of administration. The receiver was thereupon directed to proceed by bill in chancery to enforce the liability.

The theory of the receiver is that the bank was insolvent, and unable to pay its depositors in cash as their demands might be made upon it; that the liability of the stockholders of the bank to pay depositors is a contractual, and not a penal, liability or obligation; that this statutory liability creates and places at the disposal of the receiver an asset equal in amount to the capital stock, and which he can use, when necessary, to pay depositors; that the bank has depos-

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itors whose claims were due at any time upon presentation, and due, as matter of law, when the bank shut its doors; that the duty of the stockholders to furnish funds with which to pay depositors was immediate, and the liability under the statute was one to be immediately enforced by the receiver; that the receiver in this proceeding represents in no sense the bank as a corporation, but represents the depositors only; that, the necessity for the assessment being apparent, and the amount of the assessment being ascertained with reasonable certainty, and that assessment being less than the par value of the stock, the proceeding to enforce the liability should be in equity, and might be against all the stockholders, although the obligation on the part of the stockholders is a several, and not a joint, one. On the other hand, it is claimed by some of the stockholders that the liability is a collateral one, and can be enforced only after it has been ascertained that the assets of the bank are insufficient to pay depositors; that this requires that the receiver shall absolutely exhaust the assets of the bank before applying to the stockholders for contribution; that the necessity for an assessment could not be determined by the court *ex parte*, but should have been upon notice and hearing; and that the order made for the assessment, and for this suit to enforce the assessment, was without jurisdiction, and not binding upon any of the stockholders. Whether the court could proceed *ex parte* to make the order in this case is not now important. The petition made by the receiver gave the court jurisdiction to determine, at least, the necessity for the commencement of the proceeding against the stockholders to collect some amount, as it was made apparent that there was a deficiency. On the hearing on the bill in the present case, the receiver, without waiving reliance upon the *ex parte* order determining the amount of the deficiency and directing the necessity for the bringing of the suit, established by testimony the condition of the bank and the necessity for an assessment of at least 70 per cent., being the amount theretofore fixed by the court in the *ex parte* order. There was no testimony offered

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on the part of the stockholders to show that the bank was solvent, or that the receiver's estimates were not correct; and, in fact, there was no testimony offered by the stockholders showing that the condition of the bank was not as claimed by him, nor did they attempt to question the value fixed by him upon the assets. Counsel for the receiver, however, cites many cases supporting the procedure for the *ex parte* order here taken, though he concedes that a stockholder might show in the proceeding that the bank was not in fact insolvent, but had ample cash or other assets with which to pay its indebtedness; and some of the cases cited by counsel seem to hold that the facts upon which the circuit judge acted in making the *ex parte* order were untrue, or that there was collusion or fraud inducing the ordering of the assessment. But, as no such showing was made here, and the complainant did not rest upon the *ex parte* order, but introduced testimony showing the necessity and the amount, that question need not be discussed. We are satisfied that the court had jurisdiction, and that there was no error in directing the proceedings.

The liability may be enforced in law or equity. 3 How. Ann. St. § 3208e5, being section 46, Act No. 205, Pub. Acts 1887. This section provides: "The stockholders of every bank shall be individually liable, equally and ratably and not one for another, for the benefit of the depositors in said bank to the amount of their stock at the par value thereof, in addition to the said stock; but persons holding stock as executors, administrators, guardians or trustees, and persons holding stock as collateral security, shall not be personally liable as stockholders, but the assets and funds in their hands constituting the trust shall be liable to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living or competent to act; and the person pledging such stock shall be deemed the stockholder and liable under this section. Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation or by

Banks—Stockholder's Statutory Liability—Enforcement.

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any receiver or other officer succeeding to the legal rights of said bank." Section 55 of the act reads: "On becoming satisfied that any bank has refused to pay its deposits, * * * the commissioner of the banking department may forthwith * * * apply to a court of record * * * for the appointment of a receiver, who, under the direction of the court, shall take possession of the books, * * * and may, if necessary to pay the debts of such bank, enforce all individual liability of the stockholders." The national banking law contains a similar provision, the only difference being that the liability is imposed for the benefit of all the creditors of the bank, instead of for depositors only. Section 5151, Rev. St. U. S. Under this United States statute, it is held that, when the comptroller of the currency orders an assessment upon stockholders in national banks, the necessity for assessment and the amount of it are not open to question in a suit against stockholders. *Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209. The practice under our state banking law places the circuit judge in the position of the comptroller under the national banking act. *Bank v. Judge*, 98 Mich. 173, 57 N. W. 121. The petition for the appointment of the receiver is addressed to the circuit judge, and he makes the appointment. The receiver is an officer of that court. That court, by the terms of the statute, has jurisdiction to determine the necessity for making an assessment and the amount thereof. The contention of defendants cannot be sustained. The liability of the stockholders is fixed by statute. It is not a mere collateral undertaking. When the bank became insolvent, and closed its doors, the depositors were entitled to an immediate payment of their money; and, when it was shown that the assets were insufficient to pay them, it became the duty of the stockholders to pay in the necessary amount, not exceeding the par value of the stock, to meet the demand. The obligation or liability of the stockholders is contractual, and not penal. *Bank v. Lawrence* (Mich), 76 N. W. 105. The stockholder is something more than a surety. He is one of the associates in the bank, and by the terms of the act

Same—Same.

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he is deemed to undertake for the debts of the depositors. *Bank v. Warren*, 52 Mich. 561, 18 N. W. 356; *Hobart v. Johnson*, 8 Fed. 493. Banking is carried on for the benefit of the stockholders. They are the only persons who profit by it. Depositors place their moneys in the bank in reliance upon the fact that they may withdraw it at any moment, or at a stated time. When demand is made for it, stockholders are liable for its immediate payment. The statute casts this burden upon them. It is one of the conditions imposed by the statute upon which stock may be issued and held. It became the duty of the receiver here to pay depositors at once, and, if the assets of the bank were insufficient for that purpose, he was bound to ascertain the amount necessary to meet the deficit. He took the proper steps to ascertain the necessity, and the court, upon the testimony, determined the amount which should be paid in.

Counsel for some of the stockholders cite the following cases from other states upon the proposition that no proceedings can be taken against the stockholders of a corporation until the assets have been first exhausted: In *Trust Co. v. Funk* (Neb.), 68 N. W. 520, the action was by a depositor against a stockholder, and it was held that the creditor had no right to maintain an action at law in its own right against the individual stockholder of the bank, merely as such, for the collection of an amount equal to the par value of the stock. The court also discussed the question of the rights of creditors and of the receiver under the banking law to proceed against stockholders before exhausting the corporate assets. Section 7, art. 11, of that constitution, provides: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." Section 4, art. 11, entitled "Miscellaneous Corporations," provides that, "before enforcement of individual liabilities of stockholders, there must be judicially determined the

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indebtedness proposed to be enforced and the assets of the corporation be first exhausted." It was held that this last provision was applicable to banking corporations, as well as others. The case of *Ueland v. Haugan* (Minn.), 73 N. W. 169, was decided upon the wording of the statute of that state, and the distinction was made between that procedure and the procedure under the national banking act. The principle here involved was not there involved. The same may be said of the case of *Cleveland v. Burnham* (Wis.), 13 N. W. 677. But in the case of *Booth v. Dear* (Wis.), 71 N. W. 816, the action was under the banking law of that state, which provides that the stockholders of a state banking corporation should be individually responsible to the amount of their stock for its indebtedness. The court said: "Such statute received construction at an early day to the effect that the liability is primary and absolute, and attaches the moment that the debt is contracted by the bank; that it is a liability of all the stockholders to all the creditors, on the principle of co-partnership, the stockholders standing on substantially the same footing as though they were partners, save, only, that the responsibility of each is limited to a sum equal to his share or shares of stock. Subject to this limitation, they are answerable as original and principal debtor, and their liability more nearly resembles that of co-partners than any other with which it can be compared." The court in that case further held that the statute did not require that the assets of the corporation should be fully exhausted before the creditors could proceed to judgment against the stockholders.

The case of *Hanson v. Donkersley*, 37 Mich. 184, upon which counsel for defendants rely, was brought under 1 How. Ann. St. § 4017. That statute provides for the organization of mining and manufacturing companies. It imposes upon stockholders an individual liability for labor done for the corporation, and allows it to be enforced against the stockholders only after the return of an execution unsatisfied, thus making the liability secondary, and not primary;

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and the remarks of MR. JUSTICE CAMPBELL in that case have no bearing here. The same may be said of the case of *Kamp v. Wintermute*, 107 Mich. 635, 65 N. W. 570, brought under a like statute, and of *Voight v. Dregge*, 97 Mich. 322, 56 N. W. 557, brought under the street-railway act. Each of these acts provides for the return of an execution unsatisfied before the action can be brought against the stockholders. The banking law does not provide for this, and was evidently intended to make the liability of each stockholder primary, and not secondary. As was said in *Bank v. Warren*, *subra*: "The shareholder is something more than a mere surety. He is one of the associates in the bank, and by the very terms of the association he is deemed to undertake for the debts which the bank contracts." It is evident that the banking law of 1887 was framed with great care to insure safe banking, and with a view to protect the depositors by compelling the payment by stockholders of a sum equal to the amount of stock held. This fund should become immediately payable when the necessity for its use is determined, and the amount fixed without waiting to exhaust the assets of the bank, if it appears that the stockholders will ultimately be called upon to make good the amount. Banking institutions have relations with the public wholly unlike any other business institutions, and the rights of depositors in banks have been carefully guarded by the act. We think the contention of counsel for the receiver is sound in principle and must be sustained.

2. Counsel for defendants contend that the act is unconstitutional, for the reason that it limits the personal liability of stockholders to depositors, while the constitution provides that they shall be liable for all debts. This contention cannot be sustained. Section 3, art. 15, of the constitution of this state, provides:

Same—Same—
Constitutionality
of Statute.

"The officers and stockholders of every corporation or association for banking purposes, issuing bank notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the term of their being officers or

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stockholders of such corporation or association equally and ratably to the extent of their respective shares of stock in any such corporation or association." This constitutional provision relates to banks of issue only. The People's Savings Bank was not a bank of issue. The provisions of the banking law do not come within this constitutional provision. It is limited to banks not of issue. The legislature had the power to impose the conditions prescribed in the act upon banks organized under the act, and to limit the liability of the stockholders to depositors. In *Allen v. Walsh*, 25 Minn. 547, this precise question was raised under a somewhat similar constitutional provision, and it was held that that provision was confined to banks of issue, and did not limit the power of the legislature as to banks not of issue. See, also, *Harper v. Carroll* (Minn.), 69 N. W. 610; *Allen v. Clayton*, 63 Iowa 11, 18 N. W. 663.

3. One of the most important questions in the case relates to the inquiry whether, when a bank suspends, those who are the then stockholders are liable under this statute to those who are then its depositors? It is the contention of some of the stockholders that those who were stockholders when each deposit was made are liable to depositors; that is, that a stockholder can be called upon to respond to those only who became depositors while he was a stockholder. It is insisted, therefore, that the rule of *Kamp v. Wintermute*, 107 Mich. 638, 65 N. W. 570, should be applied. That action was brought under an act to revise the laws providing for the incorporation of manufacturing companies, and it was held that statute could not have so broad a construction as to hold one liable who purchases stock in a corporation after the debt is contracted; that is, that a stockholder, under the act, cannot avoid the statutory liability to creditors who are such at the time he transfers his stock, and that the transferee does not take the stock subject to such statutory liability. Several cases were cited in that case to sustain that principle. That statute, and the statutes of other states under which the rulings were made, had reference to corporations other than

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banking. They provide a remedy for the individual creditor against the individual stockholder, so that it is not difficult for any individual creditor to ascertain who were the stockholders at the time the debt was created. The liability imposed by these statutes is for the whole debt. A man with five shares of stock at the par value of \$50 may be held to pay a labor debt of \$500. The effect of these statutes is to make shareholders, as to labor debts, partners, each liable for the entire debt. Our banking statute does not give this remedy to the creditor. It can be enforced only by a bank in process of liquidation, or by a receiver or other officer succeeding to the legal rights of the bank, in a suit at law or in equity. The distinction between the banking statute and these other statutes, and the construction to be placed upon them, so far as concerns the rights and liabilities of stockholders, is well stated by counsel for the receiver, as follows: "(a) In a partnership, all partners are liable for all debts. Corporations are formed for the purpose of avoiding the personal individual responsibility of those associating, and making the capital stock and assets of the corporation the sole fund for creditors. But the legislature may, and by the constitution of a state is sometimes directed to (sometimes the constitutional provision is self-executing), grant charters on condition that the partnership or common law liability of the associates as to certain kinds of debts shall continue. (b) The legislature does so except or preserve a partnership or common-law liability or obligation when it makes all stockholders liable for all debts of a certain kind or class, and provides a direct or personal remedy to the individual creditor of the corporation. In such cases it is held that the stockholders at the time the debt is contracted are like partners, at once and personally liable to pay it,—an obligation not shifted by transfer of stock. (c) When, however, the legislature has not plainly so attempted to preserve or retain for creditors a liability and remedy which, but for the law of corporations, would exist, but has in the incorporating act added a liability, limited, peculiar, purely statutory,

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and not in any sense preservative of common-law liability, the remedy provided being for all creditors, or all of a class of creditors, enforceable in their joint interests against the body of stockholders, then the liability attaches when the right of action—the default—occurs, and is against those who are then stockholders.”

It is not claimed that these propositions are recognized in all the cases, but counsel submits them as deducible from the cases, and claims that by them the cases may be the better harmonized, and a reasonably safe rule of construction presented. In this contention we agree with the learned counsel. In some of the states, the banking statute itself fixes the rights and liabilities of stockholders in express terms. The New York statute provides that “no action shall be brought against a stockholder after he shall have ceased to be a stockholder.” Laws 1892, c. 688, § 55. In Wisconsin, the statute expressly declares that a shareholder by transfer shall, in proportion to his shares, succeed to all the rights, and be subject to all the liabilities, of prior shareholders. Rev. St. 1858, c. 71. In Nebraska, the constitution provides that the stockholder shall be liable, etc., while he remains such stockholder. Const. art. 11, § 7. In Minnesota, by statute, the liability continues for one year after any transfer or sale of stock by any stockholder. Gen. St. 1894, § 2501. In Iowa the stockholder’s statutory liability is while he remains a stockholder. Laws 1880, c. 208, § 1. Our statute (3 How. Ann. St. § 3208e5) simply provides that “the stockholders of every bank shall be individually liable equally and ratably * * * for the benefit of the depositors in said bank,” etc., and by the same

Same—Same—
Effect of Trans-
fer of Stock.

section provides that such liability may be enforced, in a suit at law or in equity, by any such bank in process of liquidation, or by any receiver, etc. It seems clear to us that it was the legislative intent that the stockholders liable to depositors are those who are such at the time the bank becomes insolvent, without reference to the time when the deposits were actually made. Any

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other construction would practically repeal the entire liability clause. It is within the knowledge of all that deposits in banks are changing hourly during each day's business, thus creating uncertainty concerning the true amount on deposit at any given time. When a bank closes its doors, this change ceases. If the man who has a balance on deposit at the time the bank is closed must ascertain who were the stockholders at the time he made his deposit, and must proceed against them, there could be no common suit by a receiver for the benefit of all the depositors; for the stock in the bank might have been many times changed during the time deposits were made, and no rate could be established. It is more reasonable to hold that the purchaser of stock takes it, as a proportionable share of the bank's assets, subject to the bank's debts. With these rules in view, we may now proceed to determine the special claims made by the several defendant stockholders.

Defendant Chatterton became the registered owner of 25 shares of stock on April 1, 1892. This certificate was afterwards surrendered and divided; one for 20 shares being retained by him, and one certificate issued to his son, Floyd M., for the other 5 shares. Defendant Chatterton remained the owner of these 20 shares at the time the bank closed. He claims he should not be held as a shareholder, because he purchased his stock upon false representations made as to the value of the stock by the officers of the bank. As we have said, the receiver represents the depositors in this suit. It is their rights which are to be protected. The question here raised was squarely presented in *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585, and it was held that a stockholder, after having purchased his stock and registered it, receiving dividends, which he retains, and permitting the depositor to rely upon his apparent ownership, cannot repudiate his liability, on the ground that he was induced to purchase his stock through fraudulent representations as to the financial condition of the bank. In that case, MR. JUSTICE

Same—Same—
Purchase of
Stock Induced
by Fraud.

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MONTGOMERY cited with approval the case of *Stone v. Bank*, 3 C. P. Div. 282, in which it was held that where the corporation has gone into liquidation, and is proceeding under the winding-up act to make calls to satisfy claims of creditors, it is too late for one who has up to that time allowed his name to appear as a stockholder to avoid liability on the ground that his subscription was obtained by fraud. The rule stated must be applied to defendant Chatterton. Defendant Fraser became the owner of 10 shares of stock December 3, 1895, and remained the ostensible owner up to the time the bank closed. He makes the like claim as defendant Chatterton, and his case must be governed by the same rule. The decree below fixes the liability of these defendants at 70 per cent. of the par value of their respective shares, and must be affirmed as to them.

It appears that defendant Mifflin held a certificate for 5 shares, dated April 1, 1892. As to these shares he admits he was the registered owner, and liable to the assessment levied. The receiver contends that Mr. Mifflin is the owner of 5 other shares, and liable to pay an assessment upon them. This Mifflin contests. These shares were issued originally to Hart Row. It appears, from the testimony, that this certificate was left by Row with Mr. Dyer to be sold, and that on September 4, 1895, Dyer sold it to Mifflin for \$95 a share, Row paying him a commission of \$10. Mr. Row says that he learned from Mr. Otis, the teller of the bank, that the stock had been sold. Mr. Otis testified that Mr. Mifflin came to the bank, and, after consulting with the cashier, he (Otis) was directed to loan Mifflin \$500 on his note, which he did, and that Mifflin left with him (Otis) \$475 of the \$500, requesting him to place it to the credit of Mr. Row. This was done. Mr. Mifflin, on the same day, left with Otis the certificate of shares as collateral to his note. This certificate was placed in an envelope, and marked "Elgin Mifflin." It was assigned in blank by Mr. Row. The matter stood in this way, except for partial payments on the note by Mr. Mifflin, until July

Same—Same—
Unregistered
Stockholders.

Foster v. Broas

13, 1896,—about 10 months. The transfer was never made upon the books of the bank. The Mifflin note was paid, partly before and partly after the receiver was appointed. Mifflin, upon final payment of his note, being tendered the stock, refused to take it from the bank. The defense now made is that, in enforcing the liability of stockholders, the court will not go beyond the registered holders. There is no doubt, under this state of facts, that Mr. Mifflin was the owner of the stock, and could have compelled a transfer upon the books of the bank. He became a stockholder, had the right to attend meetings and to share in the profits, and, in fact, was entitled to the rights of every other stockholder. *McLean v. Medicine Co.*, 96 Mich. 479, 56 N. W. 68. Being entitled to all the rights of a stockholder, he cannot escape the liability of such stockholder. The mere fact that the stock had not been transferred on the books of the bank cannot aid the defendant. The stock was fully paid for, and Mifflin was a stockholder within the meaning of the banking act, and the court below was not in error in so holding.

Defendant Edmonds was a registered stockholder, as appeared by the books of the bank when it closed. He seeks to avoid liability on the ground that he was discharged from the ownership, and from liability as a stockholder, by a sale and transfer of the stock in December, 1894, or January, 1895. It appears, from the testimony of Mr. Edmonds and of Mr. Otis, the teller of the bank, that on the strength of a promised purchase of this stock by Mr. Osband, the cashier of the bank (for himself, not for the bank), Mr. Edmonds overdrew his account at the bank \$300. He transferred the stock to Mr. Osband individually. Six days later he received his pass book from the bank, and it still showed the overdraft. On January 15th he went to the bank, and asked Osband if he had given him (Edmonds) credit for the \$300. Osband replied that he had not, but would. Osband then, in presence of Edmonds, instructed Mr. Otis to place upon Edmonds' pass book a credit of \$300. Otis did so, then and

Same—Same—
Unregistered
Transfer.

Foster *v.* Broas

there making as a part of the entry the letters "C. H. O." (meaning C. H. Osband). Osband never paid the bank. The certificate of stock was found by the receiver in an envelope marked "Edmonds." No entry was made on the bank's books to show the transaction, nor any part of it. A dividend paid in July, 1895, was credited to the interest account of the bank. The overdraft of Edmonds still appears on the books of the bank as unpaid. It is claimed by counsel for the receiver that Edmonds was legally bound to see that Osband actually paid his (Edmonds') indebtedness to the bank, and that, under the circumstances, he had no legal right to rely upon Osband's doing it at some time in the future. We cannot agree with this contention. The sale to Osband was completed. The stock had been assigned, delivered, and paid for. The money had been paid to Mr. Edmonds by direction of Osband, the cashier. There is no showing that Mr. Edmonds did not act in the utmost good faith, and counsel for the receiver says in his brief: "I presume that Mr. Edmonds thought that Osband would in some way and at some time make the matter right." The bank continued to do business some 18 months after this transfer to Osband. The stock was in Osband's hands as owner. He controlled it, and had all the rights of a stockholder thereunder. Mr. Edmonds made no claim thereafter to it. We think the case is ruled by *Snyder v. Foster*, 19 C. C. A. 406, 73 Fed. 186, and *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. 61. In *Snyder v. Foster* it appeared that Snyder subscribed for 50 shares of the stock of the national bank, borrowing the money from Collins, the cashier of the bank. As collateral security for the money so borrowed, he indorsed over the certificate to Collins, and left it with him. A few months later he sold the stock to Collins for the amount of the loan and accrued interest, the certificate remaining in the hands of Collins. The bank was solvent at the time, and so continued for five years, during which time Collins collected the dividends on the stock, as shown by the bank's dividend book, but the stock was never actually

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transferred to Collins on the books of the bank. The by-laws of the bank provided that dividends should be paid to the stockholders in whose names the stock should stand, that certificates should be issued by the president and cashier, and that when stock was transferred the certificate should be canceled and a new one issued. Long after the sale to Collins the bank became insolvent, and assessment was made on the stockholders, and the receiver of the bank, finding Snyder's name as a stockholder on the books of the bank, brought suit against him. It was held that it might be inferred as a fact from the evidence that the bank had notice of the transfer of the stock by Snyder to Collins, and the termination of Snyder's relation to the bank as a stockholder, from which fact the legal presumption would follow that the bank would cause such acts to be done in relation to the transfer as its officers were called upon to do, and that the jury would be permitted to draw such inference. In *Whitney v. Butler*, *supra*, it was said: "It was suggested in argument that the defendants should have seen that the transfer was made. But we are not told precisely what ought to have been done, to this end, that was not done by them and their agents. Had anything occurred that would have justified the defendants in feeling, or even suspecting, that the transfer had not been made on the books of the bank, they would, perhaps, have been wanting in due diligence, had they not, by inspection of the bank's register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief, or to excite such a suspicion. Their conduct was, under the circumstances, that of careful, prudent business men; and it would be a harsh interpretation of their acts * * * that they allowed or permitted the name of Whitney to remain on the stock register as a stockholder." In the present case, we think that Mr. Edmonds, having delivered the certificate, properly assigned, to Osband, who was cashier of the bank, and who had control of the stock register, did all he was bound in duty to do to complete the transfer. Nor do we think that,

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because he was paid from the bank's money, he was bound, at his peril, to see that the cashier repaid it to the bank. The rights of the parties are no other or different than as though Osband paid it from his own pocket. Where he obtained the money was a matter between him and the bank, concerning not in the least Mr. Edmonds, who had every reason to believe that Osband would adjust his account with the bank in the proper manner. There is nothing in the case which would now justify us in regarding Mr. Edmonds as still a stockholder.

The defendant Jacob Stahl has a different defense from the other stockholders. He was the registered owner of 10 shares of stock, the certificates for which were issued to him in 1895 and 1896. On May 20, 1896, he sold and assigned those certificates to his brother-in-law, George Schuman, of Cleveland, Ohio, receiving therefor \$700 in cash and \$300 in settlement of a claim which Schuman had against him. The assignments were properly made on the back of the certificates. Mr. Stahl took them to the bank, and asked that new certificates be issued, which the cashier agreed to do. This was neglected by the cashier. Soon after the sale of the stock, Mr. Stahl learned that the stock was assessed to him, and went to see the cashier about it, who said: "That is all right. The stock is transferred, and I will give you a writing to that effect." He then gave him the following writing: "May 24, 1896. Mr. Jacob Stahl has transferred his stock in this bank to George Schuman, of Cleveland, Ohio. C. H. Osband, Cashier." When the bank closed on July 11, 1896, the certificates were in the bank, and no transfer had been made on the books of the bank. The sale to Mr. Schuman is not disputed. The consideration is not denied, and the proofs show that Schuman was a man of considerable means. He died soon after this purchase, leaving an estate estimated at \$15,000 to \$20,000. Some intimation is contained in brief of counsel for receiver that this was not a good-faith sale. We have examined the testimony with some care, and we are unable to say that Mr. Stahl was not

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acting in good faith. There is nothing in the evidence to show that he knew or suspected that the bank was in failing circumstances, and that he assigned this stock to avoid liability as a stockholder. It is the contention of counsel for the receiver that at the time of this sale the bank was wholly insolvent, and for that reason, and the reason that Schuman was a nonresident, Mr. Stahl should be held liable as a stockholder. The case is different from that of Mr. Edmonds. There it could not be said that the bank was insolvent at the time of the sale to Osband, and Osband, the purchaser, was a resident of the state. Considerable testimony was given in the case as to the condition of the bank for nearly a year before it closed its doors. The court below found that the bank was insolvent at the time Mr. Stahl made the transfer to Schuman, and remained so until it closed its doors; and we think the testimony sustains this finding. But, as we have said, there is no testimony showing that Mr. Stahl knew this fact. Can he, then, be held liable, though he did not know it? The court below ruled that he could be so held, because, if he had brought a proceeding against the officers of the bank to compel a transfer by them upon the books of the bank, and they had shown that the bank was then insolvent, and the transfer was to a nonresident, the transfer would not have been enforced by the courts, as it would defeat the depositors of that much of the fund. This is not the true test of Mr. Stahl's liability, and the rule laid down by the circuit judge cannot be sustained. The act under which suit is brought by the receiver is very much like the national banking act, and the rules laid down by the federal courts in reference to the liability of stockholders have great weight in determining the questions here presented. The rule laid down by the federal courts seems to be that the burden is upon the receiver of a national bank to show that a transfer of stock was made by the stockholder for the fraudulent purpose of avoiding liability as such stockholder. *Sykes v. Holloway*, 81 Fed. 432. Thompson, in his work on Liability of Stockholders (paragraph 215), lays down the rule that a transfer

Same—Same—
Fraudulent
Transfer—Bur-
den of Proof.

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of shares in a failing corporation, made by the transferror with the purpose of escaping his liabilities as a shareholder to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company, and as to the other shareholders, although, as between the transferror and the transferee, it was out and out; citing *Nathan v. Whitlock*, 9 Paige 152; *McClaren v. Franciscus*, 43 Mo. 452; *Marcy v. Clark*, 17 Mass. 330; *Johnson v. Laflin* (by DILLON, J.) 6 Cent. Law J. 131, Fed. Cas. No. 7,393. This proposition by JUDGE THOMPSON is quoted with approval by the court in *Bank v. Case*, 99 U. S. 631. It was said by the court in *Bowden v. Johnson*, 107 U. S. 261, 2 Sup. Ct. 254: "But it was held by this court in *Bank v. Case*, 99 U. S. 631, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court in that case defined as one limit of the right to transfer that the transfer must be out and out, or one really transferring the ownership, as between the parties to it. But there is nothing in the statute excluding as another limit that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by the statute to creditors." With these restrictions, and certain others which it is not important to enumerate here, as they do not affect the rights of the parties

Same—Same—
Insolvency—
Right to Trans-
fer.

in this case, it is, we think, well settled by the adjudicated cases that the stockholder has the right to make an out and out *bona fide* sale to any person capable in law of taking and holding the same, and of assuming the liabilities of the transferror in respect thereto. This right of transfer is of great benefit to stockholders. It is what gives value to the stock. The fact that the shares are transferable on the books of the bank does not limit the right of transfer, and to pass the title to the transferee. It is true that the officers of the bank will not be compelled to make the transfer on the bank's books, under the provisions of section 3208a6, 3 How. Ann. St., when the transferror is indebted to the bank. Citizens' State

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Bank v. Kalamazoo County Bank (Mich.), 69 N. W. 663. But no such claim of indebtedness is here made, and it is well settled that the title passes to the transferee the moment the assignment is made and stock delivered. Johnson v. Laflin, 6 Cent. Law J. 124, Fed. Cas. No. 7,393. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the stockholders, and, as such, entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. It does not restrict the right of the owner to transfer his stock, but clothes the corporation with the power to register *bona fide* transfers. Black v. Zacharie, 3 How. 483; Bank v. Laird, 2 Wheat. 390; Insurance Co. v. Goodfellow, 9 Mo. 149; Moore v. Bank, 52 Mo. 377; Hill v. Bank, 45 N. H. 300. No showing is made here that the bank officers refused to make the transfer on the bank's books. Instead, the cashier, who had the power to make it, promised to do so, and led Mr. Stahl to believe that the matter had been properly arranged, so that he was released from liability thereunder and Mr. Schuman protected as a *bona fide* purchaser. Mr. Stahl had a right to rely upon this. We do not think that the fact that Mr. Schuman was a nonresident can affect the rights of Mr. Stahl. There is nothing in the act which limits transfers to residents of the state. A non-resident may own such shares, and become liable thereunder, the same as a resident owner; and we know of no reason why such liability cannot be enforced in Ohio, as well as here. The engagement by the stockholder is contractual, and may be enforced in the courts. Bank v. Lawrence (Mich.), 76 N. W. 105. We are aware that Spelling on Private Corporations, at paragraph 469, lays down the rule that the right to transfer terminates by insolvency and dissolution, and that even before the insolvency is made public, if it actually exists, to allow stockholders to transfer their interests to person beyond the jurisdiction of the court would

Same—Same—
Transfer—Reg-
istry.

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be opening the door to subterfuges calculated to defeat the claims of creditors, and that creditors might defeat such transfers; but he cites no authorities to sustain this proposition, and, on the contrary, says a number of cases maintains the opposite, citing the case of *Johnson v. Laflin*, 6 Cent. Law J. 131, Fed. Cas. No. 7,393. We think Mr. Stahl cannot be treated as a stockholder, and held liable as such.

Defendant Row was the owner of stock on the first organization of the bank. When it was reorganized, he received a stock dividend, and increased his holdings to 25 shares. This

was April 1, 1892, and his stock stood in his name on the books of the bank until July 8, 1896, when it was transferred to his son. The

bill in this case, after charging the insolvency of the bank and of the son of Mr. Row, to whom the stock was transferred, alleges: "Said Row suspected or believed said bank to be insolvent, and such transfer was made by him for the purpose of escaping liability as a stockholder in said bank." There is no testimony to sustain the charge that Mr. Row believed or suspected the bank to be insolvent, and that he made the transfer to avoid liability. The bank had been doing business in the usual way up to the time the transfer was made on the books of the bank. It appears that Mr. Row had made advances of like amount of property to his other two sons, and to equalize the gift to them he gave this stock to his son Charles. It was consummated by the surrender of the certificate of stock to the proper officer of the bank on June 20th, with instructions to make the proper entry on the stock book to make the transfer complete. On July 8th the proper entry was made, and the certificate delivered to the son; and the bank failed and closed its doors on the 11th, or three days later. It was a completed gift of the stock to the son, and without any knowledge on the part of the donor that the bank was insolvent. The sole question, therefore, is, did such *bona fide* transfer by gift relieve the transferor from liability under the statute? This liability is purely statutory, is in derogation of the common law, and must be

Same-Same-
Same-Effect of
Transfer by Gift.

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strictly construed. Courts will not hunt excuses to carry it beyond the plain provisions of the statute. Cook, Stocks & S. § 214. All the authorities recognized the right to transfer in good faith and for a valuable consideration. When this is done, and the bank is a going one, statutory liability attaches only to those who are stockholders at the time the bank closes, either by action of its directors, by the action of the commissioner of banking, or by proceedings in chancery to wind up its affairs. The learned counsel for complainant cites no decision to sustain the proposition that a *bona fide* gift and transfer of stock does not relieve the transferrer from liability. His quotation from Cook, Stocks & S. § 395, does not treat of the question now before us. The author is treating solely of the "rules for corporations in regard to receiving or allowing the registries of transfers of stock." The question the author is discussing is no other than whether a corporation may refuse to register a transfer to an irresponsible transferee. He reaches the conclusion that the officers of the corporation may refuse to do so when the corporation is insolvent, but cannot refuse when the corporation is solvent. The power of the officials of the bank to register transfers is not before us. We are dealing with a case where the transfer has been made. The cases all seem to hold that the intent to avoid liability is a material element in determining the liability of one who has transferred his stock while the corporation was a going one. If this transfer had been made for a valuable consideration, it would, under the authorities, be valid, and relieve the transferrer from liability. No case is cited by counsel which makes the distinction between a good and a valuable consideration. The statute does not restrict, and is not intended to restrict, the transfer of the stock of a bank. The courts, in order to preserve the statutory liability for the benefit of creditors, have held that the transferrors in bad faith, no matter what the consideration received, are still the equitable owners of the stock for the purpose of responding to the creditors. Counsel for complainant relies largely upon

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the case of *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274. The question here considered was not involved in that case, and there is nothing to show that it was considered by the court. The case was decided upon the intent of the stockholder to avoid his liability. The court used this language: "Whether—the bank being in fact insolvent—the transferee is liable to be treated as a shareholder, in respect to its existing contracts, debts, and engagements, if he believed in good faith, at the time of the transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed, although he may be so treated, even when acting in good faith, if the transfer is made to one who is financially irresponsible." It appears, from this, that the question was not discussed by the court, and the last clause must be considered as mere dictum. The precise question was raised and decided in *Sykes v. Holloway*, 81 Fed. 432, in May, 1897. The facts are substantially parallel with those in the case before us. The question is thus stated: "We must presume, from the evidence in this record, that this transaction was made, not for a valuable, but for a good, consideration only, and that it was in fact an out and out transfer, made without knowledge or notice of the embarrassed condition of the bank; yet it was made by a mother, who could respond to her liability as a stockholder, to her daughter, who could not then respond in any degree to that liability. It therefore, to that extent, impaired the security of the existing creditors of the bank; and the inquiry is whether that fact, which was known to Mrs. Holloway, is sufficient to cause the setting aside and cancellation of said transfer." The learned judge in that case said: "I find in the decisions some broad expressions which would seem to sustain the contention of the complainant, but I have been unable to find any case in which the pecuniary condition of the transferee is a material element on the question of sustaining the transfer. It is a most material matter where the inquiry is whether or not the transfer is a *bona fide*, out and out transfer, or a mere sham; but, as far as we have examined

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the cases, none of them go to the effect that if the transfer, though without a valuable consideration, was a *bona fide*, and the transferror had no knowledge of the embarrassed condition of the bank, and no information which would have given him or her such notice, such transfer is invalid or fraudulent. * * * It seems to us that, upon principle, the pecuniary condition of the transferee of stock in a national bank at the time of the transfer, while material upon the inquiry of whether or not the transfer is *bona fide* or colorable, cannot be a decisive element on the question of liability of the transferror, where the transfer has been made out and out, without knowledge or notice of the failing condition of the bank. Such a test of liability of a transferror of stock would materially destroy the transferability of such stock, and would be an impracticable test to apply; and even though it be conceded, as in this case, that the consideration for the transfer was a good, but not a valuable, one, that fact should not be sufficient to set aside and make fraudulent the transfer." It must be assumed that the learned counsel in the present case has carefully examined the decisions, and cited us to all there are upon the subject. Probably the reason that there are no more decisions upon the precise question is that cases have seldom arisen involving it. The courts of England hold that the shareholder is not liable where he has made an out and out transfer, and do not consider the motive; holding, however, that where the transfer is merely colorable, or to be a mere dummy, the shareholder retains such an interest as makes him liable. The courts of this country have, as already shown, gone further, and hold the transferrors liable when they find an intent to escape statutory liability. We see no reason why the rule should be carried further. To hold otherwise would be to hold the stockholder liable where he has made a *bona fide* gift of the same for a good consideration, and to continue his liability for months, and even years, afterwards, if evidence can be produced that at the time the bank was embarrassed. The law contains no language to justify an

Notes

implication that it was intended to impose this double liability upon *bona fide* transferrors of stock. We think that courts are not justified in reading such liability into it.

The decree must be affirmed as to defendants Chatterton, Fraser, and Mifflin, with costs, and reversed as to defendants Edmonds, Stahl, and Row, and as to them the bill will be dismissed, with costs of both courts. The other justices concurred.

NOTES.

Stockholder's Statutory Liability—Contractual.—The usual liability imposed by statute, *viz.*, an absolute obligation to pay, and not a contingent one, such as accrues from the non-performance of certain prescribed duties, is generally held to be contractual. See *Lowry v. Inman*, 46 N. Y. 126; *Paine v. Stewart*, 36 Conn. 516; *Bond v. Appleton*, 8 Mass. 472, 5 Am. Dec. 111; *Hutchins v. New England Coal Min. Co.*, 4 Allen (Mass.) 580; *Grand Rapids Sav. Bank v. Warren*, 52 Mich. 537; *Hodgson v. Cheever*, 8 Mo. App. 321; *Mauville v. Edgar*, 8 Mo. App. 324; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Freeland v. McCullough*, 1 Den. (N. Y.) 414, 43 Am. Dec. 685; *McDonough v. Phelps*, 15 How. Pr. (N. Y.) 372; *Aultman's Appeal*, 98 Pa. St. 505; *Sacketts' Harbor Bank v. Blake*, 3 Rich. Eq. (S. Car.) 225; *Woods v. Wicks*, 7 Lea (Tenn.) 40; *Close v. Potter* (N. Y.), 8 Am. & Eng. Corp. Cas., N. S., 229; *Hanson v. Davison* (Minn.), 10 Am. & Eng. Corp. Cas., N. S., 19. See also, *Provident Sav. Inst. v. Jackson Place Skating, etc., Rink*, 52 Mo. 552; *St. Louis Ry. Supplies Mfg. Co. v. Harbine*, 2 Mo. App. 134; *Blakeman v. Benton*, 9 Mo. App. 107; *Bagley v. Tyler*, 43 Mo. App. 195; *Hathorn v. Calef*, 2 Wall. (U. S.) 10; *Conant v. Van Schaick*, 24 Barb. (N. Y.) 87; *Flash v. Conn*, 16 Fla. 428; 26 Am. Rep. 721; *Keyser v. Hitz*, 133 (U. S.) 138.

Transfers—Registration.—As between the transferrer and transferee of stock, failure to register the transfer on the books of the company does not affect its validity.

England.—*Roots v. Williamson*, L. R. 38 Ch. Div. 485, 21 Am. & Eng. Corp. Cas. 444; *Colonial Bank v. Hepworth*, L. R. 36 Ch. Div. 36, 19 Am. & Eng. Corp. Cas. 480; *Societe Generale v. Walker*, L. R. 11 App. Cas. 20, 12 Am. & Eng. Corp. Cas. 133; *Crawford v. Provincial Ins. Co.*, 8 U. C. C. P. 263.

□ *United States.*—*Black v. Zacharie*, 3 How. (U. S.) 513; *Bangor Electric Light & Power Co. v. Robinson* (C. C.), 52 Fed. Rep. 520; *Hubbard v. Manhattan Trust Co.* (C. C. A.), 87 Fed. Rep. 51, 30 C. C.

Notes

A. 520, 57 U. S. 730; *Johnston v. Laflin*, 103 U. S. 804; *Becker v. Wells Foundry Mill Co.*, 1 McCrary (U. S.) 62.

Alabama.—*Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

California.—*Parrott v. Byers*, 40 Cal. 614; *People v. Elmore*, 35 Cal. 652.

Connecticut.—*Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Georgia.—*Bates-Farley Sav. Bank v. Dismukes* (Ga.), 10 Am. & Eng. Corp. Cas., N. S., 257; *Ross v. Southwestern R. Co.*, 53 Ga. 514.

Idaho.—*Anlbach v. Dahler et al.* (Idaho), 3 Am. & Eng. Corp. Cas., N. S., 125.

Illinois.—*Otis v. Gardner*, 105 Ill. 436, 1 Am. & Eng. Corp. Cas. 643; *People's Bank v. Gridley*, 91 Ill. 457.

Indiana.—*Swift v. Smith*, 65 Ind. 428, 14 Am. & Eng. Corp. Cas. 111, 57 Am. Rep. 336; *Bruce v. Smith*, 44 Ind. 1.

Iowa.—*Farmers', etc., Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398.

Kentucky.—*Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145.

Louisiana.—*Smith v. Crescent City Live Stock, etc., Co.*, 30 La. Ann. 1378.

Maryland.—*Victor G. Bloede Co. v. Bloede* (Md.), 4 Am. & Eng. Corp. Cas., N. S., 619, 34 Atl. Rep. 1127; *Baltimore, etc., R. Co. v. Sewell*, 35 Md. 238.

Massachusetts.—*Sargent v. Essex, etc., R. Corp.*, 9 Pick. (Mass.) 202; *Nesmith v. Washington Bank*, 6 Pick. (Mass.) 324; *Brown v. Smith*, 122 Mass. 589; *Dickinson v. Metacomet Nat. Bank*, 130 Mass. 132; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

Michigan.—*Newberry v. Detroit, etc., Iron Co.*, 17 Mich. 41.

Minnesota.—*Prince Invest. Co. v. St. Paul & S. C. Land Co.*, 68 Minn. 121, 70 N. W. 1079; *Baldwin v. Canfield*, 26 Minn. 43; *Lund v. Wheaton Roller Mill Co.* (Minn.), 52 N. W. Rep. 268.

Unrecorded assignment vests equitable title in assignee. *Nicollet Nat. Bank v. City Bank* (Minn.), 35 N. W. Rep. 577.

Missouri.—*Haegel v. Western Stove Mfg. Co.*, 29 Mo. App. 480; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Chonteau Spring Co. v. Harris*, 20 Mo. 382; *White v. Salisbury*, 33 Mo. 150; *Wilson v. St. Louis, etc., R. Co.* (Mo.), 36 Am. & Eng. Corp. Cas. 290.

Montana.—*Leyson v. Davis*, 31 L. R. A. 429, 17 Mont. 220, 42 Pac. Rep. 775.

New Hampshire.—*Scripture v. Francetown Soapstone Co.*, 50 N. H. 587; *Meredith Village Sav. Bank v. Marshall* (N. H.), 11 Am. & Eng. Corp. Cas., N. S., 116.

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New Jersey.—*Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

New York.—*Mahaney v. Walsh*, 16 App. Div. 601, 44 N. Y. Supp. 969; *Cushman v. Thayer Mfg., etc., Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *New York, etc., R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York, etc., R. Co.*, 13 N. Y. 599; *Cutting v. Dameral*, 23 Hun (N. Y.) 339; *Leavitt v. Fisher*, 4 Duer (N. Y.) 1; *Bates v. New York Ins. Co.*, 3 Johns. Cas. (N. Y.) 238; *Gilbert v. Manchester Iron Mfg. Co.*, 11 Wend. (N. Y.) 627; *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 318; *Stebbins v. Phoenix F. Ins. Co.*, 3 Paige (N. Y.) 350.

Ohio.—*Conant v. Reed*, 1 Ohio St. 298; *Haldeman v. Hillsborough, etc., R. Co.*, 2 Handy (Ohio) 101.

Pennsylvania.—*United States v. Vaughan*, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; *Wood v. Maitland*, 10 Phila. 10 (Pa.) 84; *Bank of Commerce's Appeal*, 73 Pa. St. 59.

Rhode Island.—*Lippitt v. American Wood Paper Co.*, 15 R. I. 141; *Beckwith v. Burrough*, 13 R. I. 294.

In *Sayles v. Bates*, 15 R. I. 342, 5 Atl. Rep. 497, it was held that registration was not necessary to perfect the transfer, in the absence of a charter provision or by-law requiring it.

Tennessee.—*Cornish v. Richards*, 3 Lea (Tenn.) 1.

The legal as well as equitable title to stock is vested in the pledgee, even though there was no registration as required by the company's charter. *Parker v. Bethel Hotel Co.* (Tenn.), 34 S. W. Rep. 209.

Texas.—*Rio Grande Cattle Co. v. Burns* (Tex.), 36 Am. & Eng. Corp. Cas. 306.

Wisconsin.—*Ex parte Murphy*, 51 Wis. 519.

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(*Supreme Court of Colorado, June 4, 1900.*)

Receiving Deposits after Insolvency—Prosecution of Bank Officer—Indictment.*—In an information, based upon the statute of Colorado declaring: "If * * * and president * * * of any bank * * *, shall receive or assent to the reception of any deposit

*See *State v. Cadwallader* (Ind.), *ante*, p. 651, and *note*, p. 660; *Cassidy v. Uhlmann* (N. Y.), *ante*, p. 661.

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of money * * * in such bank * * * after he shall have knowledge of the fact that such * * * bank * * * is insolvent, he shall be deemed guilty of larceny," charging the receiving of the deposit and the assenting thereto as having been done by the same person at the same time, the punishment for both or either acts being the same, both acts may be combined in one count, as constituting but one offense.

Same—Same—Failure of Bank Prima Facie Evidence of Knowledge of Insolvency—Constitutionality of Statute.—The portion of such statute providing that the failure of a bank at any time within 30 days after a deposit is *prima facie* evidence of knowledge on the part of the defendant in a prosecution under the statute that the bank was insolvent at the time of its reception is constitutional; and such evidence, unless overcome by defendant's evidence, is sufficient to sustain a conviction.

Same—Same—Intent—Proof.—In a prosecution based upon such statute, against the president of a bank, it is not necessary to show any specific intent to injure another upon the part of defendant; and if defendant has been criminally negligent in not informing himself as to the condition of the bank, that fact, coupled with proof that he did the act prohibited, will be sufficient to warrant a conviction.

Same—Same—Effect of Defendant's Negligence and Incapacity.—A bank officer cannot exempt himself from criminal liability under such statute by intentionally absenting himself from the bank, and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that, if he had given his attention to its business, his lack of capacity, and unfamiliarity with banking methods, would have prevented him from ascertaining the bank's condition.

Care Required of Bank President—Knowledge of Bank's Condition—Presumptions.—The president of a bank is bound to exercise that degree of care and diligence in the management of its affairs which an ordinarily prudent person would do in like circumstances, and, therefore, must exercise reasonable care and diligence for the purpose of ascertaining and keeping himself advised as to its financial condition; and the knowledge on this subject which could have been thus obtained he is presumed to possess.

Receiving Deposits after Insolvency—Prosecution of Bank President—Ignorance of Bank's Condition—Due Care—Evidence.—In such a prosecution, if it appears that defendant had, by the exercise of the degree of care required of him, obtained information which led him to believe that the bank was solvent when the deposit was

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received, a conviction is not warranted, although the bank was insolvent; and, therefore, in such a proceeding, evidence tending to show what steps defendant had taken in the way of informing himself regarding the solvency of the bank is admissible.

ERROR by defendant to Montezuma county district court.
Reversed.

The defendant (plaintiff in error) was convicted of statutory larceny, in that, as president of the Bank of Rico, which was incorporated and doing a general banking business under

the laws of the state of Colorado, he received
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and assented to the reception of a certain deposit in said bank, knowing at the time that the institution was then insolvent. The statute on which the information was based declares: "If * * * and president * * * of any * * * bank, or banking institution, * * * shall receive or assent to the reception of any deposit of money * * * in such bank or banking institution, * * * after he shall have had knowledge of the fact that such * * * bank or banking institution is insolvent, he shall be deemed guilty of larceny," etc. Sess. Laws 1885, p. 50; 1 Mills' Ann. St. § 222.

Gerry & Taylor, C. A. Johnson, and A. B. Seaman, for plaintiff in error.

David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Carey, Asst. Atty. Gen., for the People.

CAMPBELL, C. J. (after stating the facts). The propositions urged by the plaintiff in error, and relied upon for a reversal of the judgment, may be thus stated: First, the information is double; second, the evidence of the people admitted by the trial court failed to show defendant's personal knowledge of the insolvency of the bank, and evidence offered by the defendant to show his lack of knowledge thereof, and as an excuse for his ignorance, was erroneously rejected.

1. It is strenuously argued by counsel that the receiving of a deposit in the circumstances named in the statute is one

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offense, and the assenting to its reception is another and a distinct offense, and that, while the two may be separately set forth in the same information, it is improper to combine them in one count. Unquestionably, the rule at common law, as well as in most of the states of the Union, is that offenses which are entirely distinct and separate, and require different proof, may not be included in the same count of an indictment, even though they may, when relating to the same transaction, be included in different counts thereof. A number of authorities have been called to our attention under which, it is said, this information is bad. The case upon which plaintiff in error seems mainly to rely is *U. S. v. Cadwallader* (D. C.), 59 Fed. 677, where the indictment was for violating the national bank laws. The statute prohibited the "embezzling, abstracting or willfully misapplying the moneys" of the bank, and the court held that each of these acts constituted a separate crime or offense, which may be joined in one indictment, but must be stated in separate counts. The federal statute was really decisive of the point, but the court in part rested its conclusion upon the rules of common-law pleading. In the opinion the district judge used this language: "If the statute describes only different stages, degrees, or phases of one and the same offense, these degrees or phases may undoubtedly all be set forth and charged in the same count of the indictment; but if the statute defines different and distinct offenses, each requiring different proof to establish it, there can be little doubt that they should not be joined in the same count, though they may all, or any of them, be united in different counts in the same indictment." The controlling question seemed to be that, in the judgment of the court, the proof to establish either one of these offenses would be wholly inadequate to make out a case under either of the others. A number of cases are referred to by the learned judge as recognizing the principle upon which the decision was put. Other cases cited by plaintiff in error, which are, in some respects at least, in his favor, are: *People v. Cooper*, 53 Cal. 647;

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State v. Haven, 59 Vt. 399, 9 Atl. 841; *Larison v. State*, 49 N. J. Law 256, 9 Atl. 700; *People v. Tower*, 135 N. Y. 457, 32 N. E. 145. In most, if not in all, of the authorities relied upon by him, some material element, not present in the case at bar, differentiates them from it. Fairly considered, none of them controls the decision here.

Our statute seems to be substantially the same as that of Missouri, and counsel say that the decisions there are in their favor. In *State v. Wells*, 134 Mo. 382, 35 S. W. 615, it was held that, where a defendant was charged with receiving a deposit, a conviction could not be sustained, where the evidence was only to the effect that he assented to its reception. In passing, we may say that, in many respects, the facts of that case are essentially different from the facts of the case in hand. But this authority is cited to the proposition that the receiving and assenting to the reception are different offenses. The facts of the case did not call for any decision as to whether or not the act of receiving and the act of assenting thereto might or might not be charged in the same count, and therefore, if there is language in the opinion either for or against the practice, it would be obiter. If, however, any legitimate inference can be drawn therefrom one way or the other, it is that such a union may be made; for the court in its opinion cites with approval *State v. Batson*, 31 Mo. 343, and *State v. West*, 21 Mo. App. 309. In the former case the indictment was under a statute declaring that every person who "shall willfully and maliciously break, destroy or injure the door or window of any dwelling house" shall, upon conviction, be adjudged guilty, etc. (Rev. Code Mo. 1855, p. 584, § 60); and the indictment, following the language of the statute, charged in one count that the defendant "broke and injured the door of a dwelling house," and in another count that he "broke with force and arms the windows of a dwelling house." The court said: "The terms 'break, injure or destroy' being used disjunctively in the statute, the offense is well described by charging it to have been committed as in the second count by a breaking alone,

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or as in the first by both a breaking and injuring. It is an offense to willfully and maliciously break, destroy, or injure. To do either act is to commit an offense, and one or all these things may be charged in an indictment according to the circumstances of the case." In the latter case the indictment was under a statute providing: "If any public officer * * * shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty, * * * he shall be declared guilty of a misdemeanor in office," etc. Rev. St. Mo. 1879, § 1642. The indictment was based on the second clause, and in speaking to the objection urged against the same the court said: "It is to be borne in mind that the section of the statute is in the disjunctive, and contains two offenses. The first is for being intoxicated while in the performance of any official act or duty, and the second is for becoming so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required by his office. It was competent to indict him, according to the facts, for either or both of these offenses."

In *State v. Sattley*, 131 Mo. 464, 33 S. W. 41, the indictment against the defendant contained two counts,—one for receiving a deposit, the other for assenting to the creation of an indebtedness,—and the court sustained a general verdict of guilty, and upheld a sentence as for one offense, on the ground that the several offenses charged arose out of one and the same transaction. The court in that case did not hold that those offenses might not be charged in one count. That they might be stated separately is not at all conclusive that they may not be combined. And the general verdict would not have been upheld, and on principle could not be sustained, except on the ground that receiving and assenting are but different ways of charging the same offense, and when they relate to the same transaction, and are the act of one and the same person.

In *Clifford v. State*, 29 Wis. 327, it was held where a stat-

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ute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, it is a general rule that the whole may be charged conjunctively in a single count as a single offense; for in that case all are regarded as constituting but one offense, and the conviction or acquittal is regarded as a sufficient bar to all or either, whether separately or conjointly pleaded.

In *State v. Bielby*, 21 Wis. 206, defendant was convicted of vending, selling, dealing, and trafficking in and giving away liquors. DIXON, C. J., in replying to an objection to the form of the indictment, said: "It is objected that the complaint is bad for duplicity, because the several acts named in the statute, if charged separately, would each constitute a distinct offense. This may be so, but still the complaint is not double. An indictment in such case may pursue the language of the statute, charging the commission of the several acts conjunctively, and as constituting all together one offense, in which case there can be but one conviction and one punishment, as for one offense."

Hinkle v. Com., 4 Dana 518, was a case where the defendant was convicted under an indictment charging him with setting up and keeping a gaming table, and inducing another to bet at it, and the court says: "Although the setting up of a gaming table may alone be an indictable offense, and the keeping of such table, and the inducing of any person to bet upon it, another, when each shall have been committed by different persons or at different times, nevertheless, as they are co-operating acts, constituting all together one offense, when committed by the same person, at the same time, an indictment for that combined act, in violation of law, may properly charge the whole in one count, and but one punishment can be inflicted, as for one offense."

In *State v. Nelson*, 29 Me. 329, it was held that the buying and receiving and aiding in concealing stolen goods constitute but one offense, which may be committed in three different modes, and all three may be charged in the same count of the indictment.

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In *State v. Price*, 11 N. J. Law 203, the indictment charging the defendant in the same count with burning, and causing to be burned, a dwelling house, was held good.

Byrne v. State, 12 Wis. 519, 529, seems quite in point here, for the indictment charged the defendant with "knowingly receiving and sanctioning the reception of an illegal vote," and the language of the court, by DIXON, C. J., seems particularly appropriate: "The rule is well settled that where a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count, as constituting all together but one offense. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law. * * * There can be no doubt that the receiving and sanctioning the reception of a vote, under the circumstances stated in the statute, are distinct offenses, and when committed separately may be indicted as such, but the indictment is not double or uncertain because both are joined in the same count, for the reasons above stated."

If that reasoning is good, and it seems to us to be so, certainly it applies with equal force to the reception, and assenting to the reception, of a deposit. It has frequently been held that an indictment for forgery which charges that the defendant "forged and caused to be forged" is good. See, also, *Com. v. Twitchell*, 4 Cush. 74; *Ben v. State*, 22 Ala. 9; *State v. Fletcher*, 18 Mo. 425; *State v. Morton*, 27 Vt. 310; *Bish. Dir. & Forms*, §§ 19-21; *Bish. St. Crimes*, § 244; *Bish. Cr. Proc.* §§ 434-453; *Boldt v. State*, 72 Wis. 7, 38 N. W. 177.

We have thus reviewed some of the authorities cited, but might content ourselves with citing only the decisions of our own court. In *Pettit v. People*, 24 Colo. 517, 52 Pac.

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676, and *Chipman v. Same*, 24 Colo. 520, 52 Pac. 677, the same doctrine is laid down. It is true that in most of these cases the question of duplicity was decided in misdemeanor cases, and it is urged that a different rule applies to felonies. There might be ground for this distinction at the common law, when almost all felonies were punishable by death, and followed by forfeiture of the offender's lands and goods; but under the modern practice, and under the statutes of most of the states of the Union, we are of opinion that there is no valid distinction in this respect between informations charging misdemeanors and those relating to felonies. *State v. Warner*, 60 Kan. 94, 55 Pac. 342; 10 Enc. Pl. & Prac. 532 *et seq.*, and cases cited.

In *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, the indictment, under the same statute, was precisely the same as that here, in that it charged defendant with receiving, and assenting to the reception, of certain deposits of money. The opinion does not refer to this, and it does not appear whether an objection thereto was made. We make the reference only for the purpose of showing a practice which has long prevailed in this state, whereby, under statutes enumerating several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged conjunctively in one count as one offense.

If the position of plaintiff in error is correct that the receiving of a deposit, and the assenting to its reception, by one person, at the same time (as the charge here is), are entirely distinct and separate offenses in the sense contended for, then so much of the act as punishes one who assents to the reception of a deposit is void as not properly coming within the title of the act, which provides only for the punishment of a person receiving deposits, and, indeed, such is the contention of counsel. But the same objection would pertain to the act in relation to larceny of live stock, found in Sess. Laws 1891, p. 130; but this act, in *Re Pratt*, 19 Colo. 138, 34 Pac. 680, has been held constitutional. We are of opinion that where,

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as in the information here, the receiving of a deposit and the assenting thereto are charged as having been done by the same person at the same time, and relate to the same transaction, and the punishment for both or either is the same, they may be combined in one count, and together constitute but one complete offense, for which there can be but one punishment. In other words, where two or more acts, stated in the statute disjunctively, either of which is an offense by itself if done by different persons or at different times, when done by the same person and at the same time, and relate to the same transaction, and are followed by the same penalty, they may be united in one count of an indictment or information, as constituting but one offense.

2. The Bank of Rico was organized under the state banking laws. It had a president (the defendant McClure), a vice president, and a cashier. The defendant resided in the town of Montrose, about a hundred miles distant from the town of Rico, where the business of the bank was carried on. He was rarely present at the bank,—probably not more than once or twice a year,—and the management was exclusively intrusted to the other officers named. The defendant did not deny the insolvency of the bank, but maintained that he had no personal knowledge of its affairs. He was not present at the bank, or in the town of Rico, at the time the deposit in question was received into the bank. It was, on the contrary, received by an employee of the bank, whose duty, among other things, was to receive deposits in the ordinary course of business. The concluding portion of the statute under which the indictment was framed provides that the failure of a bank at any time within 30 days after a deposit is *prima facie* evidence of knowledge on the part of the person charged that such bank was insolvent at the time of its reception. This bank failed within 3 days after the deposit was made for receiving and assenting to which the defendant was informed against. The fact of this failure,

Same—Same—
Failure of Bank
Prima Facie
Evidence of
Knowledge of
Insolvency—Con-
stitutionality of
Statute.

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then, if the statute be valid, was *prima facie* evidence of defendant's knowledge of the bank's insolvency. The proof is clear that the bank was insolvent.

The validity of this portion of the act is attacked by plaintiff in error, but its constitutionality was settled by the decision of this court in *Robertson v. People*, *supra*, and in addition thereto, supported, as it is, by the cases cited in the opinion, we refer to other subsequent decisions under similar provisions: *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176; *Brown v. Same*, 173 Ill. 34, 50 N. E. 106; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179. There was, then, before the court, a *prima facie* case of knowledge of insolvency made out, and unless it was overcome by evidence produced in behalf of the defendant, or rejected under his offer, the proof was sufficient in this respect to sustain the conviction, and this presents the most important question in the case.

3. The theory of the people was that the defendant had reorganized this bank, had induced the public to deal with it as a safe and solvent institution, had given it credit and standing in the community by the use of his name as president, which was uncontradicted, and in the circumstances, occupying the position he did, it was his official duty to know the condition of the bank, and that he could not be permitted as a defense to plead ignorance or want of knowledge of its insolvency in the manner attempted. Upon the other hand, the defendant, in order to show lack of knowledge of, while not denying, the bank's insolvency, offered to show that he did not reside in the town in which the bank was doing business, gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition. To excuse himself for not knowing about its financial condition, he offered to show that he was an illiterate man, possessing no knowledge of banking or bookkeeping, and that he was totally unable

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to determine from the books of the bank its condition, even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico, and with the value of the securities held by the bank; that he had no personal knowledge of their value, and was dependent for what information he did have upon representations made to him by the officers in charge. These representations were that on their face the securities were double the total liabilities of the bank. He offered, further, to produce evidence showing the entire history of the bank and his connection with it; that, among other things, the books had been fraudulently and improperly kept by the officers in charge; that peculations by them of the bank's assets had been made; and that after the failure the cashier, upon whom he placed the responsibility for the failure, had absconded. Such, in substance, as stated by counsel for plaintiff in error, was the character of testimony which he sought to introduce. The court refused to admit it, and accepted the theory of the prosecution, which has already been briefly stated.

The specific errors assigned to the rulings upon the evidence, and to the action of the court in giving and refusing instructions, need not be separately considered; for whether such rulings and acts are correct or erroneous depends entirely upon our decision as to which of the two theories governs. If the court was right in rejecting the offer of evidence, it was also right in its ruling upon the instructions; for the one ruling was entirely consistent with the other.

The court in one of its instructions told the jury that, under the law of this state, a crime consists in the violation of a public law in the commission of which there shall be a union, or joint operation, of act and intention, or criminal negligence. This is in the exact language of the statute. But counsel for plaintiff in error says that in this kind of a crime criminal negligence cannot take the place of intention or guilty knowledge. In *State v. Tomblin*, 57 Kan. 841, 48 Pac. 144, the court held that it was proper for the jury to

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take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it, for the purpose of determining whether he actually knew its insolvent condition, but that mere negligence would not render him guilty of a crime ; and to the same effect is cited *People v. Comstock*, 115 Mich. 305, 73 N. W. 245. The Michigan case is not in point, for the statute construed in terms declared the offense created thereby was one that involved an intent to defraud, and the court decided that a specific intent was meant. *State v. Warner*, *supra*, is cited as probably the strongest case in support of the contention of plaintiff in error. The defendant was charged as having been the president of an incorporated bank, which was insolvent, and having accepted and received deposits knowing the bank to be insolvent. The court there held that, in order to sustain a conviction, the proof must show that the defendant had some direct personal connection with the receipt or acceptance of the deposit. The facts that he was the president, and in a back room of the bank at the time the deposit was received, and that he knew that the institution was open for business, were held insufficient to sustain his conviction under such charge. The statute of Kansas is not exactly the same as ours, and the court held that, as framed, it seemed to denounce its penalties against the individual who should actually and physically take deposits into the bank when he knows it to be insolvent, and also against all others who should knowingly connive at only that it was not sufficient to sustain the charge of having permitted or connived at the reception of the deposit, but sufficient to uphold a charge against the defendant of having the question whether the evidence given at the trial was their reception. The court expressly declined to pass upon received it directly. So it will be seen that the case is not authority as to that part of the present information which charges the defendant with assenting to the reception of a deposit, and is squarely opposed to the decisions of the courts of other states, under statutes more nearly like ours,

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which declare the doctrine that an officer of a bank may be criminally liable for the act of an employee who physically receives the deposit. *State v. Cadwell*, 79 Iowa 432, 44 N. W. 700; *Same v. Yetzer*, 97 Iowa 423, 66 N. W. 737. These cases from Kansas are the only ones which have been called to our attention which seem to hold that personal knowledge of insolvency upon the part of the person charged must be established, that he must have received the deposit in person, and that ignorance of insolvency due to criminal negligence is not equivalent to knowledge.

We think the theory of the prosecution is sustained by the following among other cases, in addition to those elsewhere cited in opinion: *Meadowcroft v. People*, *supra*; *State v. Beach*, *supra*; *State v. Shove*, 96 Wis. 1, 70 N. W. 312; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *Martin v. Webb*, 3 Sup. Ct. 428, 24 L. Ed. 49; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Carr v. State*, 104 Ala. 4, 16 South 150. In *Baker v. State*, *supra*, it was said: "A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession, and subject to his control, and for that reason he may be safely trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is intrusted with money merely because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the money, of the ignorant and unwary by an implied deception." In *State v. Buck*, *supra*, it

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was held that as a bank officer it was defendant's business to know the financial condition of his bank at any and all times ; and in *Meadowcroft v. People*, *supra*, it is said : "If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency."

We think this is as applicable to the president as to the owner of a private bank. Under this statute it is not necessary to show any specific intent upon the part of the defendant to injure another. If he does the act enjoined

Same—Same—
Intent—Proof.

with knowledge of the insolvency of the bank, no specific intent to harm need be shown. Such

being the case, if the defendant has been criminally negligent in not informing himself as to the condition of the bank, that fact, coupled with the proof that he did the act prohibited, will be sufficient to warrant a conviction. 8 Am. & Eng. Enc. Law (2d Ed.) 285-289. The authorities there cited establish the proposition that the negligent performance of a duty imposed by law, or assumed by contract or wrongful act, may render the person guilty of such negligence criminally liable. Of course, mere negligence does not, but criminal negligence does, supply the place of intention or guilty knowledge, under this act. Clark, Cr. Law, pp. 45-48.

The question then is, may a banker, or an officer of a bank, exempt himself from criminal liability under the statute, by intentionally absenting himself from the bank, and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that, if he had given attention to its business,

Same—Same—
Effect of Defend-
ant's Negligence
and Incapacity.

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his lack of fitness, and unfamiliarity with banking methods, would not enable him to ascertain its true condition? The mere statement of the proposition, it seems to us, is its own refutation.

After a careful examination of the entire record, the writer of this opinion is thoroughly convinced that the offer of evidence made by the defendant and refused by the court amounts to nothing more than this : That the defendant was ignorant of the insolvency of the bank because he willfully ("willfully" in the sense of "intentionally") neglected the means whereby he could or might have ascertained its condition, and paid no attention whatever to its business, though holding himself out as the president of a solvent institution, thereby encouraging persons to deal with it; or his lack of knowledge arose from the fact that his unfamiliarity with business methods was so pronounced that he could not have ascertained its true condition had he made an examination into its affairs, but would have been obliged to depend (as he did) upon statements of its solvency made to him by those who had active management of its affairs. A person cannot, upon such a pretext, escape the natural and necessary consequences of his own voluntary acts, which, in this case, clearly amount to criminal negligence. In line with the other authorities cited in support of this conclusion, is *Carr v. State*, *supra*, which in all essential particulars is on all fours with the case at bar. The opinion contains an excellent statement of the law applicable to this case as to the duty of a bank officer to know its financial condition, and any excerpt would fail to disclose what only a careful reading of the entire opinion reveals. See, also, *State v. Cadwell*, 79 Iowa 432, 44 N. W. 700; *Same v. Yetzer*, 97 Iowa 423, 66 N. W. 737.

It may be true that in the management of a bank the power of its president is less than that of the cashier. But we submit that the president cannot shield himself from criminal liability by casting the responsibility of failure and insol-

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vency upon other officers, who were more immediately and directly contributory to it, by a plea of ignorance of the straits into which the institution has fallen, when that ignorance is due entirely to his criminal negligence in failing to acquaint himself with its affairs, or to his inability, natural or otherwise, to acquire knowledge had he exercised his faculties to that end. The person who took the deposit in question was an employee of the bank, authorized by its officers to receive deposits into the bank in the ordinary course of business. Defendant, as president, either joined in conferring this authority, or, with knowledge of its existence, acquiesced in it. After the bank was insolvent, and after defendant knew it, or would have known it, had he not kept himself in ignorance of its financial condition by criminal negligence, he neither revoked the authority of the teller, nor did anything to discourage or put a stop to the taking of deposits by closing the doors, or giving notice that deposits would not be received. By such conduct he clearly assented to the reception of deposits. It was not essential to a conviction that he should assent to this particular deposit, or that he should have acquiesced in its reception after he obtained actual knowledge that it had been made. His recognition of the general authority of the teller to receive deposits, without taking any steps to prevent such action, after he knew, or, in law, is charged with knowledge, of insolvency, is an assent to the reception of this deposit by his employee. *State v. Sattley, supra*. My conclusion is that the offer by defendant to show his want of knowledge of the bank's insolvency was properly rejected, for the facts, if admitted to be true, furnish no excuse or justification whatever, in the light of his own admissions, for his not knowing, or attempting to ascertain, the financial condition of the bank, and that instruction No. 16, under the facts in evidence, taken, as it should be, with all the other instructions, was right. Therefore I believe the judgment should be affirmed.

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My associates, however, while agreeing with me as to the general law of the case as hereinbefore declared, are of opinion that the trial court erred in rejecting the testimony offered by the defendant to show what steps he had taken to ascertain the solvency of the bank, and in giving instruction numbered 16, the latter part of which they interpret as laying down the doctrine that the president of the bank is practically an insurer of its solvency, which they hold is not the law. Their reasoning for this conclusion may thus be stated: By instruction No. 16 the jury was, in effect, advised that, so long as plaintiff in error retained the presidency of the bank, he was presumed to know, and it was his duty to know, its condition as to solvency or insolvency. This practically declared that at all times, and under all circumstances, he was conclusively presumed to know the financial condition of the bank, without respect to what steps he may have taken to ascertain this fact, which is not the true rule; for, in effect, it made him the absolute guarantor of the solvency of the bank. As an official of that institution, he was bound to exercise that reasonable degree of care and diligence in the management of the affairs of the bank which an ordinarily prudent person would do in like circumstances. This would impose upon him the duty of exercising reasonable care and diligence for the purpose of ascertaining and keeping himself advised regarding its financial condition. The knowledge on this subject which could have been thus obtained he is presumed to possess. As a witness in his own behalf, he was asked to state what the value of the assets of the bank was at the time it was organized. He was also interrogated relative to the information he gained on the question of the solvency of the bank at the time he visited that institution. He was further interrogated regarding the statements of the officials who appear to have been in the active charge of the affairs of the bank relative to the representations they made to him regarding the value of the securities held by the bank,

Care Required of
Bank President—
Knowledge of
Bank's Condi-
tion—Presump-
tions.

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and if they stated that the assets were more than the liabilities. He was also asked what information he had with respect to the value of loans and discounts of the bank. To each of these questions objections were interposed on behalf of the state, and sustained. That plaintiff in error had no knowledge regarding the financial condition of the bank at the time of its failure (which want of knowledge resulted from his own acts in either failing to give proper attention to its management, or in intentionally neglecting to ascertain its condition) would not overcome the *prima facie* case made by the state. Whether or not, however, he had exercised that degree of care and diligence in keeping himself informed

Receiving Depos-
its after Insol-
vency—Prosecu-
tion of Bank
President—
Ignorance of
Bank's Condition
—Due Care—Evi-
dence.

regarding its condition which an ordinarily prudent business man would have done, was a question of fact for the jury to determine. If he had, and by the exercise of this care obtained information which honestly led him to believe

that the bank was solvent at the time of its failure, then he would not be guilty, although mistaken in his judgment. The instruction given by the court ignored this rule. The evidence above noted should have been admitted, as it tended to prove what steps the plaintiff in error had taken in the way of informing himself regarding the solvency of the bank. It will thus be seen that, while the members of the court are in harmony as to the law governing the case, they differ in their interpretation of the instruction noted, and as to the character of the evidence offered and rejected. The majority holding there was error of the trial court in these respects, the judgment should be reversed, and the cause remanded; and it is so ordered. Reversed.

State Exch. Bank of Parkersburg v. Town of Parkersburg

STATE EXCH. BANK OF PARKERSBURG

v.

TOWN OF PARKERSBURG.

(*Supreme Court of Iowa, Oct. 10, 1900.*)

Banks—Taxation of Deposits by Stockholders—Oral Agreement Not to Withdraw—Bank's Capital.—At the time of the organization of the bank it was agreed among its stockholders that each should deposit in the bank an amount equal to the face value of the stock held by him. This was done, and certificates of deposit were issued to the stockholders for the amount of this fund contributed by each. There was an oral agreement between the stockholders that these deposits should not be withdrawn, but in case of a sale of stock they were to pass to the purchaser, to whom a new certificate of deposit should issue. This agreement was observed, and no such deposit was ever withdrawn from the bank; and the same dividends were paid on them as on the capital stock. At the time the assessment in question was made the indorsement on these certificates was merely "Non-negotiable"; but at all times they were in terms payable on surrender. *Held*, that such fund was properly assessed to the bank as in the nature of capital.

APPEAL by bank from Butler county district court.
Affirmed.

Courtright & Arbuckle, for appellants.

Edwards & Camp and *Geo. A. McIntyre*, for appellee.

WATERMAN, J. In giving in its property to the assessor two items were overlooked by the bank, and it now concedes that its proper assessment should be \$5,151.36. The controversy here arises over a certain sum of \$50,000, which, if assessable to the bank, would increase its assessment to the amount fixed by the board of review. If this sum of \$50,000 is not taxable to the bank, the proper assessment is \$5,151.36. The capital stock of the bank is \$50,000. At the time of organization it was agreed among the stockholders that each

State Exch. Bank of Parkersburg v. Town of Parkersburg

should deposit in the bank an amount equal to the face value of the stock held by him, making a total deposit by stockholders of \$50,000. This was done, and it is this amount which is the subject of controversy. Certificates of deposit were issued to the stockholders for the amount of this fund contributed by each. There was an oral agreement between the stockholders that these deposits should not be withdrawn, but, in case of a sale of stock, they were to pass to the purchaser, to whom a new certificate of deposit should issue. This agreement was observed, and no such deposit ever was withdrawn from the bank. For a time these certificates bore the indorsement, "Not negotiable except with stock certificate No. —;" the number in each case being inserted. But changes were made at times, and when this assessment was made the indorsement was merely, "Nonnegotiable." At all times the certificates were in terms payable on their surrender.

It is said the oral agreement not to withdraw the deposits was invalid, and could not have the effect to alter the terms of the written instruments. Such an agreement is not invalid. It is only a rule of evidence that prevents it being shown in any case. But in any event, as the oral agreement was in fact observed and treated as binding by the stockholders and the bank, we see no reason why the rights of defendant may not be rested upon it. Neither of the parties affected ever questioned the bank's right to hold this money as against the claims of those who deposited it. Why, then, may not the municipality accept a condition which those parties recognize as existing? Under the oral agreement, these deposits belonged to the bank. They were part of its working capital, and not an indebtedness which it might be called upon to pay. As strengthening this view, we may add that the same dividends were paid on these deposits as upon capital stock. If the bank had the use of this money under an agreement between those who deposited it by which they bound themselves not to withdraw it, the certificates of deposit are in no sense different from stock certificates, and

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this money must be treated as surplus capital. Section 1322 of the Code provides that shares of stock in state banks shall be taxed to such banks, and this section, together with the one immediately preceding, prescribe the manner in which the value of such shares shall be ascertained. That method was pursued by the assessor; but this particular sum of \$50,000 was treated as a deposit to be assessed to the individual owners, and was deducted from the total assets of the bank under the rule announced in *Campbell v. City of Centerville*, 69 Iowa 439, 29 N. W. 596. The board of review, in revising the assessment, charged this up as in the nature of capital, which, for the reasons given, we think was correct. Affirmed.

GRANGER, C. J., not sitting.

SANTA ROSA NAT. BANK

v.

BARNETT *et al.*

(*Supreme Court of California, July 21, 1899.*)

Overdrafts—Renewal of Debt by Note—Stockholder's Liability—Limitations.—In an action to enforce the personal liability of the stockholders, an account between the corporation and the bank, which was an ordinary running account, such as is common with the depositors in a bank, showed numerous overdrafts and a balance due the bank on a certain date for which the corporation subsequently gave its note. *Held*, that suit could have been brought on such account, and limitations began to run against the bank in favor of the stockholders, whenever it showed an overdraft.

Same—Same—Same—Same.—Such note was but a renewal or extension of the indebtedness theretofore incurred by the corporation, and not a renewal or extension of its stockholder's liability.

Overdrafts—Deposits—Payment.*—General deposits made in a bank where the depositor is drawing against the account from time

*See note at end of case.

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to time by checks and drafts, are to be deemed as payments on account of any existing overdraft of the depositor.

Mutual Accounts.—Payment, whether it be of money or of personal property at a stipulated value, made on an account as a payment, and not as a set-off *pro tanto*, does not make an account mutual.

Limitations—Constitutionality of Statute.—The section of the statute of California merely limiting the time within which such an action may be brought is not in conflict with the constitutional provision creating such liability, as the latter is silent on the subject of limitations.

Same—Statutes.—Such section of the statute is not in conflict with statutory provisions merely relating to the liability of directors, or having reference only to actions against persons or corporations with whom money has been deposited.

Harmless Error.—Harmless error is no ground for reversal.

APPEAL by plaintiff from Sonoma county superior court.
Affirmed.

R. M. Swain and Barham & Miller, for appellant.

A. B. Ware, Thomas Rutledge, and W. F. Russell, for respondents.

CHIPMAN, C. Action to enforce the personal liability of defendants as stockholders in the Central Street Railway Company, a corporation. Defendants pleaded the statute of limitations, and upon that plea had judgment except as to the sum of \$392.49, for which plaintiff had judgment against defendants for the proportionate share of each. Plaintiff appeals from the judgment and from an order denying motion for new trial.

The court found: That defendants were stockholders of the railway company. That from and after May 28, 1891, and until December 4, 1892, plaintiff loaned and advanced the company, from time to time, large sums of money, which were used in the construction of its railroad, the purchase of material for equipment, etc. During this time the company made deposits of money, and a balance of account was struck nearly every month, showing the amount due from the company, which balance, on December 4, 1892, was \$9,607.51. On December 6, 1892, the company, by resolution, authorized

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its secretary and president to make and deliver its promissory note to plaintiff for the amount due plaintiff, and this note was executed December 7, 1892, for the sum of \$10,000, and delivered to plaintiff. The plaintiff thereupon, on December 7th, gave the company credit on plaintiff's books for \$325.-89, that sum being the difference between the overdraft and the face of the note at the time of the credit. No other or different consideration was given for said note. That \$9,607.-51 of said indebtedness was created and existed prior to December 4, 1892, and was created at different times between May 14, 1891, and December 4, 1892, and said sum was included in and made part of the sum agreed to be paid by said note of \$10,000. It is also found that this note was renewed June 7, 1894, for \$9,000, a payment of \$1,000 having been previously made by the company; and that the renewal note, which is the note set up in the complaint, included the same sums of money as did the original note of December 7th. As conclusions of law the court found that the sum of \$9,-607.51, included in said note, is barred by the statute (sections 338, 359, Code Civ. Proc.); that the sum of \$392.49 was a debt created by the company at the time of making the note of December 7, 1892; and that defendants are separately liable for their proportionate share of that sum, and no more. The complaint was filed December 5, 1895, one day more than three years after the balance of \$9,607.51 was found to be due plaintiff.

1. Appellant claims that the note of December 7th was in accordance with section 456, Civ. Code, "and became an executory contract, and created a debt for which the stockholders became liable,"—citing sections 2, 3, art. 12, Const.; *Hunt v. Ward*, 99 Cal. 615, 34 Pac. 335; that a new debt was created by the note, which became "dues of a corporation" (see constitution cited), and the statute did not begin to run until December 7th. The evidence is that the account was opened with plaintiff by William Prindle, treasurer of the Central Street Railway Company. The pass book used by Prindle was marked on the inside at top of first page, "Central Street

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Railway Company, in Account with the Santa Rosa National Bank, 1891," and the first entry in it is dated May 14, 1891. On the outside the book was marked, "Treasurer of Central Street Railway Company, in Account with the Santa Rosa National Bank." It was shown that these indorsements were partly written by the president and partly by the cashier of the bank. It appears that the assessments against stockholders, earnings of the company, and its funds generally, went to the credit of this account, and the checks or drafts against it were generally drawn by Prindle, the treasurer, but the bank paid as checks the warrants drawn by the president and secretary of the company on the treasurer. It is clear from the evidence that the overdraft indebtedness was treated both by the bank and the company as the indebtedness of the latter. The fact that the account was kept in the name of the treasurer did not make it his individual account in any sense, nor was it so in fact. The account shows no transactions except receipts and disbursements of money by the bank. It was an ordinary running account, such as is common with depositors in a bank. There was an implied

Overdrafts—Renewal of Debt by Note—Stockholder's Liability—Limitations.

promise on the part of the company to pay overdrafts whenever and at the time they occurred (*Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29); and on the account, as balances accrued against

the company, there was a primary liability on the part of the stockholders. Suit could have been brought upon this account upon the daily balances as shown by the account. A liability was incurred as shown by these balances, and, unless suit was brought within three years after the liability was incurred, the action was barred by section 359, Code Civ. Proc. *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62; *Hunt v. Ward*, 99 Cal. 614, 34 Pac. 335. The note of December 7th was but a renewal or extension of

Same—Same—Same—Same.

the indebtedness theretofore incurred on the part of the corporation, but it was not a renewal or extension of the stockholders' liability. *Hy-*

man v. Coleman, *supra*. We do not think the claim made

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by appellant can be sustained that the account was a mutual, open, and current account, within the meaning of section 344, Code Civ. Proc., and that the note, when passed to the credit of the company, must be treated as the last item in the account, drawing with it all preceding items, thus starting the statute December 7th, the date of the note, for the balance appearing December 4th. General deposits, such as these were, made in a bank where the depositor is drawing against the account from time to time by checks and drafts, are to be deemed as payments of any overdraft of the depositor. Payment, whether it be of money or of personal property at a stipulated value, made on an account as a payment, and not as a set-off *pro tanto*, does not make an account mutual. Norton *v.* Larco, 30 Cal. 126; Adams *v.* Patterson, 35 Cal. 122; Rocca *v.* Klein, 74 Cal. 526, 16 Pac. 323. Where articles of merchandise have been delivered, and there is no evidence as to whether there was in fact a sale or a payment in kind, "the legal presumption is that it was a sale, and not a payment in kind. It is otherwise in the case of a delivery of money. There the presumption is that it was a payment, and not a loan." SANDERSON, J., in Norton *v.* Larco, *supra*. The evidence shows that the railway company authorized its officers to arrange to borrow money from plaintiff. An account was opened with the bank by a small deposit in April, 1891, for the company. Other deposits of considerable amount were made, but about November, 1891, the account showed an overdraft, which continued to grow until the note of December 7th was given. Balances were struck nearly every month, showing the indebtedness of the company. Deposits, from time to time, of small amounts, were made throughout the entire period, and were credited to the company as payments, and so show on the pass book kept by the company, and in which these monthly balances were entered. The nature of the account we do not think was changed by the fact that it opened with a credit to the

Overdrafts—Deposits—Payment.

Mutual Accounts.

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company. We can discover no elements of a mutual, open, and current account in the transaction.

2. It is contended that section 359, Code Civ. Proc., is in conflict with section 3, art. 12, of the constitution of this state. It is claimed that the Code section was enacted prior to the adoption of the constitution, and that the latter must prevail. The constitutional

Limitations—
Constitutionality
of Statute.

provision referred to declares that "each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder," etc. No limitation of time is prescribed by the constitution within which actions must be brought. Section 1, art. 12, of the constitution continued in force all laws not inconsistent therewith. Section 359 does not attempt to relieve the stockholder from his liability under the constitution. It only limits the time within which the action may be brought, and this is not inconsistent with the constitutional declaration that such liability is imposed upon the stockholder.

3. It is claimed that section 359, Code Civ. Proc., is in conflict with sections 309, Civ. Code, and 348 Code Civ. Proc. Section 309 relates to the liability of directors of corporations, and section 348 has reference only to actions against persons or corporations with whom money has been deposited. Neither of these sections refers to the liability of stockholders. This liability is declared by the constitution and by section 322, Civ. Code. There is no conflict between these sections.

Same—Statutes.

4. It is objected that the evidence does not support findings 8, 9, and 10, for the reason that the evidence shows more money to have been deposited by the company than the findings seem to imply. This may be true, for the evidence shows deposits nearly every month. Still the evidence is that the overdraft increased steadily from about October, 1891, and, even if the court failed to find as to all the deposits, it would not change the nature of the account.

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5. After the evidence was closed, and the cause submitted to the court, and was by the court taken under advisement, and before the court had made findings, plaintiff served notice of motion "to amend the complaint to conform to the proofs made upon the trial of the said cause." ^{Harmless Error.} The proposed amendment was to the effect that the original indebtedness for which the promissory note of December 7th was made was for a balance due upon an open, current, and mutual account. The evidence shows that the cause was tried upon this issue as fully as if it had been pleaded as proposed by the amendment. Even if an abuse of discretion, which we do not think it was, the ruling of the court was without injury. I advise that the judgment and order be affirmed.

We concur: COOPER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

NOTE.

Overdrafts—Application of Deposit—Presumption.—A deposit made by a customer who has overdrawn his account will be presumed to be general, and to have been made and applied for the purpose of satisfying such overdraft, where there is no evidence to the contrary. *Nicholas v. State*, 46 Neb. 715. See also, *Hale v. Richards*, 80 Iowa 164.

COSGROVE *et al.*

v.

PROVIDENT INST. FOR SAVINGS IN JERSEY CITY.

(*Court of Errors and Appeals of New Jersey, June 18, 1900.*)

A savings bank adopted, and caused to be printed upon its deposit books, a by-law which provided that "deposits and dividends shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized, and only upon production of the depositor's book, that such payments may be

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entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers." *Held*:

Savings Banks—Deposits—Payments—By-Law Printed upon Deposit Book as Part of Contract.*—That such by-law, printed upon a pass book given to a depositor and accepted by her, became a part of the contract between her and the bank.

Same—Same—Same—Same—Construction of By-Law.—That, by the true construction of such by-law, a payment made by the bank, in good faith and in the exercise of due care, to any person who produces the pass book, operates to discharge the bank, without regard to whether or not such person is entitled to draw the money. (Syllabus by the Court.)

ERROR by defendant to supreme court. *Reversed.*

Charles H. Hartshorne, for plaintiff in error.

Linn & Speer, for defendants in error.

GUMMERE, J. This writ of error is brought to review the judgment of the supreme court, affirming a judgment of the Hudson circuit court, in favor of the plaintiffs in an action brought by them to recover a balance alleged to be due upon their deposit account with the defendant savings institution. The only question in dispute between the parties was as to the effect of a payment of \$150 made to an unknown woman who presented the bank book of the plaintiffs at the defendant's banking house, and, on the representation that she was the plaintiff Mary Cosgrove, demanded payment of and received the sum mentioned. It is admitted that she drew the money without the knowledge of the plaintiffs, or either of them, and unlawfully appropriated it to her own use. It is also admitted that the defendant used reasonable care and diligence to identify the payee, and that the money was paid to her in good faith, in the belief that she was in fact the person whom she represented herself to be. It is further admitted that, at the time when the plaintiffs opened their account with the defendant company, one of its by-laws provided that "deposits and dividends shall be drawn out only by the depositors in person, or by

*See notes at end of case.

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their written order, or by some person legally authorized, and only upon production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers"; that such by-law was printed upon the deposit book which was given to the plaintiffs when they became depositors; and that it was in force at the time that the wrongful withdrawal of their funds occurred. It being admitted that the contested payment was made by the bank in good faith and in the exercise of due care, the rights of the parties must depend upon the true construction of the by-law above quoted; for the plaintiffs, by accepting the deposit book with this by-law printed upon it, had become chargeable with knowledge of its provisions, and as they made no objection to such provisions, they the presumed to have assented to them, and the by-law therefore became a part of the contract between the parties. *Appleby v. Bank*, 62 N. Y. 17; *Allen v. Bank*, 69 N. Y. 314; *Wilcox v. Bank*, 40 Hun 302; *Goldrick v. Bank*, 123 Mass. 320; *Heath v. Bank*, 46 N. H. 78; *Gifford v. Bank*, 63 Vt. 108, 21 Atl. 340, 11 L. R. A. 794; *Eaves v. Bank*, 27 Conn. 233; *Burrill v. Bank*, 92 Pa. St. 134. What, then, is the true construction of this by-law? The supreme court considered that, in its legal effect, it was like that which was construed by the court of appeals of New York in *Smith v. Bank*, 101 N. Y. 60, 4 N. E. 123, the language of which was: "All payments made by the bank upon the presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor. Money may also be drawn upon the written order of the depositor or his attorney, when accompanied by the pass book." In the cited case it was determined that the bank was not protected by this by-law in making a payment under the conditions existing in the present case. The decision turned upon the construction to be given to the first clause of the by-law, *viz.*: "All payments made by the bank upon the presenta-

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Deposits—Pay-
ments—By-Law
Printed upon
Deposit Book
as Part of
Contract.

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tion of the pass book, and duly entered therein, will be regarded as binding upon the depositor." The by-law being silent as to the person or persons to whom payment was to be made, the court construed the word "payment" to mean the turning over of money to a person entitled to receive it in discharge of an obligation of the payor. It is unnecessary for us to determine whether we are prepared to follow the New York court in the construction put by it upon the by-law which was before it; for we disagree with the conclusion of our supreme court that, in its legal effect, it is like that now under consideration. On the contrary, the latter by-law differs vitally from the former in this respect: that it designates the persons to whom a payment made will discharge the bank. It says, "All payments to persons who present the deposit book," etc. The proper construction of the word "payment," when thus used, is not, as it seems to us, the technical one adopted in the case in 101 N. Y. 58, 4 N. E. 123. The sense in which it is used is the turning over of money by the holder of it to any one of a designated class of persons; that is, "persons who present the deposit book." And that this is the proper meaning of the word when used as it is in the present by-law is admitted by RUGER, C. J., in delivering the opinion in 101 N. Y. 58, 4 N. E. 123. In discussing the by-law in the case then before the court, he distinguishes it from that which was under consideration in the case of *Schoenwald v. Bank*, 57 N. Y. 418, which provided that "all payments to persons producing the deposit book shall be deemed good and valid payments to depositors, respectively." He says (speaking of this latter by-law), "There the language of the by-law plainly implied and provided for payments made to other persons than the depositor, and gave a significance to the word 'payments' which included strangers having possession of the pass book." In the *Schoenwald Case* it was determined that, by force of the by-law there considered, a payment made by the bank in good faith, and in the exercise of reasonable care, to a stranger who had wrongfully come

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into the possession of the plaintiff's deposit book, absolved the bank from liability to again pay the money. As a precedent, *Schoenwald v. Bank* is much more apt than that of *Smith v. Bank*, in settling the construction to be given to the by-law under review. The supreme court in the present case, adopting the meaning given to the word "payment" in the *Smith Case*, held that the last clause of the by-law before us, that "all payments to persons who present the deposit book," meant payments to such persons as are legally entitled to receive payment under the conditions specified in the earlier part of the by-law; that is, (1) to the depositor on presentation of the book, (2) to a person presenting the book with a written order of the depositor to draw the money, or (3) to some other person legally authorized to receive the money upon presentation of the book,—as, for example, an executor or administrator. It seems to us that this is not the true construction of this by-law. It first declares who shall be entitled to draw out deposits, namely, the depositor himself, or some person having a written order from him, or any other person legally authorized. But it provides that, even as to those three classes of persons, the right to draw out shall not be absolute, but shall be conditioned upon the production of the deposit book. So far the by-law has no bearing upon the terms upon which the bank is to be discharged from liability; for it is manifest that if the bank, notwithstanding this provision of the by-law, should see fit to pay to one of these three classes of persons without the production of the deposit book, such payment would completely discharge the bank from any liability to pay over again. It is only the last clause of the by-law which deals with the question of the terms upon which the bank shall be discharged, and that clause declares that exemption from further liability shall follow upon payment to any person who presents the deposit book. By the true construction of this by-law, the bank is not compelled to pay any person, not even the depositor himself, unless the

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bank book is produced (provided, of course, it is not lost or destroyed); but a payment made by it in good faith, and in the exercise of due care, to any person who produces the pass book, operates to discharge the bank, without regard to whether or not such person is entitled to draw the money. Accepting this as the true construction of the by-law, the suggestion is made that it is unreasonably harsh upon the depositor, and for this reason should not be sustained. We cannot accept this suggestion as sound. This bank has many thousands of depositors. It is impossible that its officers or clerks should personally know more than a small proportion of the whole number. It is apparent that, if strict proof of the identity of each depositor was required whenever he should seek to draw out a portion of his deposit, great inconvenience would be caused to them. To obviate the necessity of such a practice, and at the same time to protect from depredation the common fund of the depositors which constitutes the sole capital of the corporation, some such rule as that presented by the case before us is required. The judgment of the supreme court should be reversed.

Same—Same—
Same—Same—
Construction of
By-Law.

NOTES.

Savings Banks—Deposits—By-Laws Part of Contract.—A by-law exempting a savings bank from liability for the payment of a deposit to the wrong person, when the deposit book has been lost or stolen, and no notice thereof has been given by the depositor, is a material part of such depositor's contract with the bank, where he has agreed to be bound by the by-laws. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

The provision in a pass book that "no withdrawal will be allowed without the book, and the book is the order for the withdrawal" constitutes a part of the contract between the depositor and the bank. *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 194. See also, *White v. Bank*, 22 Pick. 183; *Eaves v. People's Sav. Bank*, 27 Conn. 234, 71 Am. Dec. 59; *Wallace v. Lowell Inst. for Sav.*, 7 Gray (Mass.) 137; *Mitchell v. Home Sav. Bank*, 38 Hun (N. Y.) 255; *Wall*

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v. Provident Sav. Inst., 88 Mass. 320; *People's Sav. Bank v. Cupps*, 91 Pa. St. 315.

The by-laws of a bank declared that "the institution will not be responsible for loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment," and that it "does not undertake to be answerable for the consequences of any mistake as to identity, if it pays to a wrong party upon the bank book being presented." It was also required that every depositor should agree to and sign the by-laws, and in case of the loss or theft of the book, should give immediate notice thereof to the bank. *Held*, that the executor of a depositor whose book was stolen after her death could not recover where the deposit had been paid to the person presenting the book, though such depositor could not read, and though the executor had published probate citation prior to such payment. *Donlan v. Provid. Inst.*, 127 Mass. 183, 34 Am. Rep. 358.

Such a by-law exempting the bank from liability for paying the deposit to a stranger presenting the pass book, if the bank had not been notified of the loss of the book, was held a good defense, even though the depositor could neither read nor write. *Burrill v. Dollar Sav. Bank*, 92 Pa. St. 134, 37 Am. Rep. 669. See also, *Goldrick v. Bristol County Sav. Bank*, 123 Mass. 320; *Levy v. Franklin Sav. Bank*, 117 Mass. 448.

In *Eaves v. People's Sav. Bank*, 27 Conn. 229, 71 Am. Dec. 59, the court said: "Had the book contained this further notice, that the presentation of the book shall be taken to be full authority for paying the money, the defendants would have had a good defense; for it might be reasonably held in that case that the bank insisted upon this as a condition of receiving the deposit. * * * Let the rule be inserted in the book and assented to by the depositor, and then it will be a sufficient authority for such a payment."

In *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500, it was held that the officers of a savings bank are to be held to the exercise of reasonable care and diligence; and that, if these officers, using such care and diligence, but lacking the present means of identifying the depositor, pay, upon presentation of the book by one apparently in the lawful possession of it as the owner thereof the institution has a right to rely upon the contract of the depositor safely to keep the evidence of his claim, or to make known its loss before it is presented for payment.

Where a by-law of a savings bank provides that the deposit shall, upon the depositor's death, be paid to his personal representative, another by-law providing that the bank shall be discharged upon payment to the person presenting the pass book is not applicable in

Notes

the case of a wrongful payment where the depositor is dead. *Podmore v. South Brooklyn Sav. Inst.*, 62 N. Y. Supp. 961.

Same—Same—By-Laws as Affecting Care Required of Bank.—Even though the by-law of a bank provides that it shall be exempt from liability for payment of the deposit to the wrong person, where the book has been stolen or lost and no notice given it by the depositor of such loss, it is not thereby relieved where it failed to exercise good faith and ordinary care. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

Ordinary care and diligence in behalf of its depositors to prevent paying their deposits to the wrong persons are required of a savings bank, although a by-law of the bank exempts it from liability for payments made when the deposit book is presented. *Abramowitz v. Citizens' Sav. Bank*, 40 N. Y. Supp. 385; *Tobin v. Manhattan Sav. Inst.*, 26 N. Y. Supp. 14; *Kelly v. Emigrant Ind. Sav. Bank*, 2 Daly (N. Y.) 227; *Cornell v. Emigrant Ind. Sav. Bank*, 9 N. Y. S. R. 72; *Kress v. East Side Sav. Bank*, 66 Hun (N. Y.) 635; *Clark v. Saugerties Sav. Bank*, 62 Hun (N. Y.) 346.

The bank must exercise ordinary care and diligence to protect its depositor. *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314; *Appleby v. Erie Co. Sav. Bank*, 62 N. Y. 12. See also, *Sullivan v. Lewiston Inst. of Savings*, 56 Me. 507, 96 Am. Dec. 500.

In *Kummel v. Germania Sav. Bank*, 127 N. Y. 488, 13 L. R. A. 786, the court said: "Assuming that the by-laws printed in the book are binding upon the depositor, and constitute a contract between the parties, we still think that the duty devolves upon the officers of the bank to exercise care and diligence, in order that their depositors may be protected from fraud and larceny. The defendant by its by-laws, to which we have called attention, has undertaken with the plaintiff that payment shall not be made unless he shall call for the same in person, or by an attorney duly constituted by writing, signed and acknowledged. Here is a positive and direct agreement, which would absolutely protect the plaintiff from losses of this character. This agreement, however, must be considered as modified by that which follows, to the effect that the bank will not be responsible for fraud committed on its officers in producing the pass book and drawing money without the knowledge or consent of the owner; but this modification does not permit the officers to carelessly shut their eyes, and pay to any person presenting the pass book, but, on the contrary, they owe the depositor active vigilance, in order to detect fraud and forgery." *Podmore v. South Brooklyn Sav. Inst.*, 62 N. Y. Supp. 961.

The depositor may recover where the bank fails to use proper care and diligence in ascertaining whether it is paying the rightful

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owner. *Rosen v. State Bank*, 65 N. Y. Supp. 666; *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

The degree of care required of a savings bank to avoid paying a deposit to the wrong person is that degree of care which a person of average prudence would exercise. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

In *Geitelsohn v. N. Y. Sav. Bank*, 45 N. Y. Supp. 90, it was held that due care had not been exercised by a bank which paid out a deposit to a stranger presenting the deposit book, when the owner of the deposit book was known to the paying teller by sight.

The stipulation in the by-laws of a savings bank that a deposit may be withdrawn by any one presenting the book does not relieve the bank from the duty of acting in good faith and with reasonable care. *Kimball v. Norton*, 59 N. H. 1, 47 Am. Rep. 171; *Wall v. Emigrant Ind. Sav. Bank*, 64 Hun (N. Y.) 249; *Salings v. German Sav. Bank*, 15 Daly (N. Y.) 386.

The by-laws of a savings bank provided that, "all payments made by the bank, upon the presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor. Money may also be drawn upon the written order of the depositor or his attorney when accompanied by the pass'book." Held, that such by-law did not relieve the bank from liability where it made the payment to a stranger who presented the book unaccompanied by any written order. *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58, 54 Am. Rep. 653.

Same—Same—Same—Question for Jury.—The question whether the bank exercised due diligence to discover whether payment was being made to the proper person is one for the jury. *Podmore v. South Brooklyn Sav. Inst.*, 62 N. Y. Supp. 961; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *Salings v. German Sav. Bank*, 15 Daly (N. Y.) 386; *Farmer v. Manhattan Sav. Inst.*, 15 N. Y. Supp. 235.

It is for the jury to determine whether the bank used its best efforts to prevent fraud. *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314.

Same—Same—Same—Burden of Proof.—The burden is on the depositor to show that the bank did not exercise ordinary care and diligence at the time it paid out the money. *Israel v. Bowery Sav. Bank*, 9 Daly (N. Y.) 507.

Same—Same—Notice of By-Law.—In *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175, it was held that the requirements of the Michigan statute as to savings banks that the deposits shall be paid to the depositor or his legal representatives cannot be changed by a by-law relieving the bank of liability to the depositor where it has paid the deposit to a third person who has stolen the deposit book, unless the attention of the depositor is called to the by-law, and he gives actual or implied assent thereto.

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The fact that the depositor could neither read nor write does not operate to relieve him from the effect of a by-law exempting the bank from liability where it pays the deposit upon presentation of the pass book. *Burrill v. Dollar Sav. Bank*, 92 Pa. St. 134, 37 Am. Rep. 669; *Donlan v. Provid. Inst.*, 127 Mass. 183, 34 Am. Rep. 358.

Same—Same—Assent Implied.—The failure of a depositor who made his deposit by mail to sign the book assenting to the by-laws of the bank is not conclusive that he did not assent thereto, but such assent will be implied where the depositor retained his book and continued his deposit for several years. *Gifford v. Rutland Sav. Bank*, 63 Vt. 108.

Same—Same—Indemnity.—As to duty of depositor who has lost his pass book to furnish indemnity before his deposit is paid him, see *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78, 88 Am. Dec. 94; *Mitchell v. Home Sav. Bank*, 38 Hun (N. Y.) 225; *Wall v. Provident Inst.*, 85 Mass. 96, 88 Mass. 320.

Compare *Palmer v. Providence Inst.*, 14 R. I. 68, 51 Am. Rep. 34.

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v.

WEST CHICAGO PARK COM'RS.

WEST CHICAGO PARK COM'RS

v.

MCNULTA.

(*Circuit Court of Appeals, Seventh Circuit, March 2, 1900.*)

Deposits—Public Funds—Misappropriation—Liability of Bank.*—It was charged that a member of a banking firm, who was also the treasurer of a *quasi* municipal corporation, misapplied the moneys of such corporation deposited by him in a national bank; and that the bank, though its officers, knowingly, and for its own advantage, permitted and participated in a diversion of such fund to the discharge of the liabilities of the firm to itself, when the latter was insolvent. *Held*, that such charge was sustained by the evidence, and that the bank was liable for the amount so divested.

Same—Same—Same—Same—Pleading.—In the suit to recover such amount from the bank, proof of the insolvency of such firm, when

*See note at end of case.

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the bank participated in a diversion of the public funds to the discharge of the liabilities of the firm to itself, was pertinent to the allegation of the bill of misappropriation of such funds by the public officer and the bank; and a more direct averment of the firm's insolvency was not necessary.

Assignments of Error.—A specification of error to the effect that the court erred in finding the defendant indebted to complainant is too general to be considered on appeal.

Deposits Drawing Interest—Insolvency—Preferential Claims.—A deposit upon which interest must be paid cannot be special or in trust, and, in case of the failure of the bank, must, for the purpose of payment be on the same footing with general deposits or unsecured demands.

APPEAL by receiver and cross appeal by plaintiff from the circuit court of the United States for the Northern division of the Northern district of Illinois. *Affirmed.*

Thomas A. Moran and John P. Wilson, for appellant.

John S. Miller, E. O. Brown, and Francis Riddle, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. These appeals are from a decree by which the West Chicago Park Commissioners, a *quasi* municipal corporation, was adjudged entitled to recover of the National Bank of Illinois, at Chicago, the sum of \$316,013 40, and the receiver of the bank was directed to pay the complainant as a creditor for that amount ratably with other creditors of the bank. The receiver, who is the principal appellant, challenges the liability of the bank. The contention on the cross appeal is that the sum due the park commissioners should have been declared a preferred claim. The theory of the bill, in brief, is that Edward S. Dreyer, who was the senior member of the banking firm of E. S. Dreyer & Co., and from March 13, 1894, until December 21, 1896, was the treasurer of the West Chicago Park Commissioners, misapplied the moneys of that body to the discharge of the liabilities of E. S. Dreyer & Co. to the National Bank of

Case Stated.

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Illinois, at Chicago; the officers of the bank participating in the wrong.

The facts and circumstances in evidence are set out in great detail in the report of the special master, but only a summary statement here is deemed necessary. E. S. Dreyer & Co. was a partnership, composed of Edward S. Dreyer and Robert Berger, a son-in-law of George Schneider, who from August, 1871, to the end, in December, 1896, was the president of the National Bank of Illinois. The business of the partnership, commencing about 1879, was at first confined to dealings in real estate and mortgage loans, but later was extended to private banking. This was done at the instance of Schneider, the president, and W. A. Hammond, the second vice president, of the National Bank of Illinois, who promised that the bank would see the firm "through." The subsequent transactions of the bank which have been brought into question in this suit seem to have been efforts to make good that promise. The firm was not a member of the Chicago Clearing House, but "cleared" through the National Bank of Illinois. It is substantially true, as stated in the brief for the appellant, that, from the inception of the business until the failure of the bank, the firm kept a deposit account in the bank, "to the credit of which were placed all checks deposited with E. S. Dreyer & Co., and all moneys received by them and paid out over their counter, and to which account all checks upon E. S. Dreyer & Co. coming through the clearing house were charged, and also all cash paid by said bank to the firm of E. S. Dreyer & Co. This method of doing business continued through the entire period covered by E. S. Dreyer's treasurership of the West Chicago Park Commissioners. For a short time after his appointment as treasurer, Dreyer kept an account in the National Bank of Illinois as treasurer of the West Chicago Park Commissioners. The last deposit to the credit of this account was made in November, 1894. On April 29, 1895, there stood to the credit of this account only the sum of

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\$908.20, which was subsequently transferred to the credit of the account of E. S. Dreyer & Co. in the National Bank of Illinois. After November, 1894, all park funds coming into Dreyer's hands were deposited by him to his credit as treasurer with E. S. Dreyer & Co., and were deposited by said firm to their credit with the National Bank of Illinois, the same as all other checks and deposits received by them as bankers, and all warrants drawn on E. S. Dreyer as treasurer were paid by E. S. Dreyer & Co. through the National Bank of Illinois precisely the same as all other checks drawn on them by their depositors."

But while, as an outline of the method of business pursued, this statement is not especially objectionable, its full significance will be more evident when it is added that at the time of Dreyer's appointment as treasurer of the West Chicago Park Commissioners, E. S. Dreyer & Co., though possessed of large interests in real estate, were practically insolvent, and without the aid of the National Bank of Illinois would have been forced to suspend. The bank held their obligations for large amounts, and, besides, their deposit account almost constantly was heavily overdrawn. In this situation Schneider, the president of the bank, became surety upon Dreyer's first official bond, and upon each successive bond required upon his reappointment at the end of each year. Dreyer's first deposit was \$249,024.75, made on April 13, 1894, to the credit of E. S. Dreyer & Co.'s account, which was then overdrawn to the amount of \$19,054.06. On the next day E. S. Dreyer & Co. drew against their account so replenished a check in favor of E. S. Dreyer, treasurer, for \$199,024, which was deposited in the bank to the credit of Dreyer as treasurer, and was the beginning of the account kept as before stated. This was done upon an understanding with the officers of the bank that the account should be so opened, and that, of the money coming into Dreyer's hands as treasurer, E. S. Dreyer & Co. should be allowed to use in their business \$50,000 (extinguishing the existing overdraft), and that all other park money should

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be deposited in Dreyer's account as treasurer, and should be drawn out only on checks approved by Carl Moll, the cashier of the bank; and so the business was done while that account was kept open, and large sums were checked therefrom and transferred to the credit of E. S. Dreyer & Co. for the purpose of paying further overdrafts in their account. But this method of operation was so palpably awkward—each transaction carrying on its face the proof of a misappropriation of public money to private use—that it was necessarily abandoned. The change, however, was one of bookkeeping, more than of essential fact. It was so arranged that all park funds went directly to the credit of E. S. Dreyer & Co. in the bank, constantly augmenting their deposit, or diminishing their overdraft, instead of being transferred from time to time for the purpose of reducing overdrafts; but the bank officers, the proof is convincing, all the time knew whence the money came, and were no less responsible than before for the misapplication. Accounts were kept by E. S. Dreyer & Co. from the beginning, charging themselves and crediting the West Chicago Park Commissioners with all park funds which came to Dreyer's hands as treasurer; but that was bookkeeping merely. At first the funds went actually into the National Bank to the credit of Dreyer's account as treasurer, and, after that account was closed, into the account of E. S. Dreyer & Co. in that bank. The misapplication of the money, whether by one mode of bookkeeping or the other, was essentially the same, and necessarily was so understood by all concerned. Only as a matter of book entries was it true, as quoted from the brief, that "all park funds coming into Dreyer's hands were deposited by him to his credit with E. S. Dreyer & Co., and were deposited by said firm to their credit with the National Bank of Illinois," etc.; and if it be true, as stated, that "all other checks and deposits received by them as bankers" were treated in the same way, it only emphasizes the conclusion of the court below that in legal effect "the defendant bank absorbed the banking house of E. S. Dreyer & Co., and

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thereby became, as to the complainant and its treasurer, the direct depository of complainant's money." Among the items of the account were the proceeds of bonds of the West Chicago Park Commissioners to the amount of \$600,000 face value, which in May or June, 1896, came to the hands of Dreyer for sale. The sales were effected by the National Bank, and the proceeds received by it and placed directly to the credit of Dreyer & Co., on whose books entries of the transaction were not made until the next day after receipt by the National Bank, and neither the bonds nor proceeds were ever in the actual possession of Dreyer & Co. The same is true of other items of the account.

We do not dissent from the proposition of counsel for the appellant, in their original brief, that:

"In order to render the National Bank of Illinois liable to the park commissioners, it must appear either that the bank received some benefit from the misappropriation of the park funds by Dreyer, or else that the bank was guilty of such participation in the misappropriation of said funds as to render it liable, even although it received no benefit therefrom."

Deposits—Public
Funds—Misap-
propriation—Li-
ability of Bank.

This concedes the misappropriation. The fact was undeniable; and it is apparent, on the facts already stated, both that the bank received benefit from, and actually and knowingly participated in, the misappropriation. The charge that the officers of the bank induced the deposit of the park funds in the bank to the credit of E. S. Dreyer & Co. for the purpose of thereby reducing the indebtedness of that firm to the bank, it is urged, cannot be true, because that indebtedness greatly increased during the period of Dreyer's treasurer-ship. The fallacy of this is plain. Each misappropriation, when made, operated to reduce the amount of the existing indebtedness. So Dreyer and the officers of the bank well understood and presumably intended. Each deposit made lighter the constantly growing burden of keeping the promise to see Dreyer & Berger through their embarrassments.

Equally unavailing is the argument that the insolvency of

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E. S. Dreyer & Co. was not alleged in the bill, and was not known to the officers of the bank; that they did not anticipate loss to the park commissioners by reason of the use made by Dreyer of the park funds; and that the loss arose from the unforeseen and unexpected insolvency of the bank itself, which theretofore "had honored all the checks of E. S. Dreyer & Co." While the bill contains no direct averment of the insolvency, proof on the subject was pertinent to the charge of misappropriation of the park funds by Dreyer and the bank. That the officers of the bank were fully cognizant of the embarrassed condition of Dreyer & Co., and consciously participated in the purpose, if they did not require, that the funds be appropriated as they were for the mutual benefit of Dreyer & Co. and the bank, the evidence leaves no room to doubt; and responsibility cannot be escaped on the ground that the insolvency of the bank and its inability to pay the demands of the park commissioners from time to time when called for by the checks of E. S. Dreyer & Co. was an unforeseen and unexpected event. It was the known inability of Dreyer & Co. to meet their liabilities which constituted the evident impropriety and wrong of turning over the park funds to their use; and it was participation in the misappropriation so effected that made the bank liable. The subsequent inability of the bank to meet the checks of Dreyer & Co. in favor of the park commissioners, as it had been accustomed and doubtless intended to continue to do, has no relation to the question. The bank confessedly was carrying Dreyer & Co., knowing their present inability to meet the demands of their depositors, so called, in the usual course of business from day to day; and even if, as contended, they believed that, by reason of the hoped-for advance in the values of real estate, Dreyer & Co. would become solvent, the wrong involved in applying the park funds to the present discharge of the obligations of the helpless debtor to itself was none the less obvious and inexcusable. The risk it was constantly and voluntarily assuming in the attempt to carry Dreyer & Co. it had no right to shift

Same—Same—
Same—Same—
Pleading.

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upon the park commissioners or others who had deposited with them, presumably in the belief that they were an independent, self-controlled, and responsible concern. If it be true that the park officers knew that their funds were being deposited with Dreyer & Co., it is of no significance, because they had no power or right to interfere; and it does not appear that they had any reason to suspect the insolvency or embarrassed condition of the firm. The rules of the park board required that park funds be deposited in the name of the park board; but the treasurer alone determined the place of deposit. Indeed, by the act of July 1, 1893 (Laws Ill. 1893, p. 136), he was required "at the end of each year to account for interest on the daily balances of the funds from time to time in his custody, at a rate of not less than two per cent. per annum, and as much higher as solvent banks that are reasonably accessible pay on daily balances of accounts that are subject to sight draft or check." This statute, it was held in *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372, did not affect the fiduciary or public character of funds, by converting the officer who had the custody thereof into an owner, responsible only as a debtor for the repayment of them. The accruing interest, under the statute, becomes a part of the fund to be accounted for. The bank which receives the deposit, promising to pay interest on daily balances, of course may treat the money as an ordinary deposit, allowing it to be checked out by the depositor for any proper public use. Dreyer's first account with the bank, instead of being in his own name as treasurer, should have been in the name of the park board; but the difference was perhaps not material. In one form or the other, its character would have been sufficiently indicated, and so long as checks against it were honored only when drawn by Dreyer as treasurer, and apparently for a proper public use,—and perhaps when they were not known by the bank to be for an improper use,—the bank clearly was not responsible for a resulting misappropriation of the fund; but when knowingly, and for its own advantage, it permitted

Note

and participated in a diversion of the fund to the discharge of the liabilities of an insolvent or embarrassed debtor to itself, it ought in good conscience to make restitution, and the decree to that effect is not erroneous.

The contention that the amount of the recovery is too large by reason of interest with which Dreyer & Co. charged themselves from month to month, under the statute, does not arise upon the assignment of errors. The second, third, and fifth specifications of error are to the effect that the court erred in finding the bank indebted to the complainant in the sum of \$316,-013.40, or any other sum, but there is in no specification a suggestion of the particular error now insisted upon. See *Stewart v. Morris*, 37 C. C. A. 562, 96 Fed. 703; *Columbus Construction Co. v. Crane Co.* (C. C. A.; Jan. Sess. 1900), 98 Fed. 946.

Assignments
of Error.

The cross appeal is without merit. A deposit upon which interest must be paid cannot be special or in trust, and, in case of the failure of the bank, must, for the purpose of payment, be on the same footing with other deposits or unsecured demands.

Deposits Draw-
ing Interest—
Insolvency—
Preferential
Claims.

The decree below is affirmed.

NOTE.

Misappropriation of Deposits—Liability of Bank Participating.—A bank which participates with the trustee in the misappropriation of a trust fund deposited with it is liable to the beneficiary. *Bank of Greensboro v. Clapp*, 76 N. Car. 482. See also, *Lowry v. Commercial, etc., Bank*, Taney's Decisions 312; *Walker v. Manhattan Bank*, 25 Fed. Rep. 247; *Commercial, etc., Bank v. Jones*, 18 Tex. 811.

As to misappropriations by public officers, see *Anderson v. Walker* (Tex.), 53 S. W. Rep. 821; *Butler County v. Boatmen's Bank*, 143 Mo. 13; *United States v. Nat. Bank* (C. C.), 73 Fed. Rep. 379; *East Hartford v. American Nat. Bank*, 49 Conn. 539.

O'Leary v. Abeles

O'LEARY *et al.*

v.

ABELES *et al.**(Supreme Court of Arkansas, June 9, 1900.)*

Collections—Sending Check to Drawee—Liability for Loss.*—

Where the holder of a check delivers it to a bank, as his bailee, for collection, and the latter sends it by mail to the drawee, who lives at a distance, and the drawee, upon the receipt of the check, having money on deposit to the credit of the drawer, indorses the check "Paid," and delivers it to the drawer, as between the payee or holder and the drawer the check is paid, and if the bailee bank, instead of receiving the cash, takes, for the amount of the check, exchange which proves to be worthless, the loss which the holder thereby sustains is the result of his own negligence, or that of the bailee bank.

Same—Same—Same—Effect of Drawer Being Drawee's Director.—The mere fact that the drawer of the check, at the time of such collection, was a director in the drawee bank would not render such rule inapplicable, nor make him liable for the loss resulting from such transaction.

Same—Same—Same—Same.—The mere fact that the drawer of a check is a director in the drawee bank does not charge him with knowledge that a check drawn by him on funds in the bank will not be properly presented for collection, and collected in money instead of worthless exchange.

Same—Same—Same—Same.—In such a transaction, good faith only is required of the drawer.

APPEAL by plaintiffs from Pulaski county second division circuit court. *Affirmed.*

C. B. Moore, for appellants.

Eben W. Kimball, for appellees.

WOOD, J. When the holder of a check delivers same to a bank, as his bailee, for collection, and the bank sends the

*See *Kershaw v. Ladd* (Ore.), 1 Banking Cases 271, and *notes*, p. 284; *Minneapolis S. & D. Co. v. Metropolitan Bank* (Minn.), 1 *Id.* 286.

O'Leary v. Abeles

check by mail to the drawee, who lives at a distance, and the drawee, upon receipt of the check, having money on deposit to the credit of the drawer, indorses the check "Paid," and afterwards delivers same to the drawer, as between the payee or holder and the drawer the check is paid; for, if the holder chooses this method of collection, and the bailee bank, instead of receiving the cash, takes, for the amount of the check, exchange which turns out to be worthless, the loss which the holder thereby sustains is regarded as the result of his own negligence, or that of the bank holding same for collection. This doctrine applies here. *Anderson v. Rodgers* (Kan. Sup.), 36 Pac. 1067, 27 L. R. A. 248, and authorities there cited; also, note to same; 1 Daniel, Neg. Inst. 328a; 3 Am. & Eng. Enc. Law (2d Ed.) 804; Bolles, Banks, § 295; *Association v. Clayton*, 13 U. S. App. 295, 6 C. C. A. 108, 56 Fed. 759; *Wagner v. Crook*, 167 Pa. St. 259, 31 Atl. 576; *Zane, Banks*, § 17 *et seq.*, 188; *Minneapolis Sash & Door Co. v. Metropolitan Bank* (Minn.), 78 N. W. 980, 44 L. R. A. 594. See, also, *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 504. See, *contra*, *McIntosh v. Tyler*, 47 Hun 99; *Indig v. Bank*, 80 N. Y. 100; *Briggs v. Bank*, 89 N. Y. 182. The rule, it seems, is not affected by any usage or custom where such methods of collection obtain. *Minneapolis Sash & Door Co. v. Metropolitan Bank* (Minn.), 78 N. W. 980, 44 L. R. A. 504, and authorities cited.

2. There is no rule of law that would make Abeles liable for the loss resulting from the transaction in proof, because of his being a director in the drawee bank. He is not shown to have been negligent in the discharge of any of his duties as director, whereby the loss was occasioned. He is not charged with fraud, but the proof shows affirmatively that he acted in good faith with his creditor. He believed the bank solvent, as shown by his depositing money therein on the very day his check was presented for payment. The bank was open and doing business on that day. Cer-

Collections—
Sending Check to
Drawee—liability
for Loss.

Same—Same—
Same—Effect of
Drawer Being
Drawee's
Director.

O'Leary *v.* Abeles

tainly there was nothing in his duties as director that would charge him with the knowledge that a check drawn by him on funds in the bank to his credit would not be properly presented for collection, and collected in money instead of worthless exchange. Good faith only is required of him in matters of this kind. *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855. See, also, *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

Same—Same—
Same—Same.Same—Same—
Same—Same.

Affirmed.

BATTLE, J., did not participate.

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